93-733

Supreme Court, U.S.
FILED
NOV - 8 1993
OFFICE OF THE CLERK

No. 93-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

JOHN POZSGAI and GIZELLA POZSGAI,

Petitioners,

v.

UNITED STATES OF AMERICA,
MERCER WRECKING & RECYCLING CORPORATION,
J. VINCH & SONS, INC.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

Daniel J. Popeo
Paul D. Kamenar
(*Counsel of Record*)
Washington Legal Foundation
2009 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 588-0302

Counsel for Petitioners

Date: November 8, 1993

78 pp

QUESTIONS PRESENTED*

1. Whether under the Commerce Clause, the U.S. Army Corps of Engineers can excercise jurisdiction under Section 404 of the Clean Water Act, 33 U.S.C. § 1344, over wetlands located above the headwaters --a category of wetlands which, along with the category of isolated wetlands, the Corps considers to have insignificant individual or cumulative effects on the environment?

2. Assuming that the Corps can exercise jurisdiction over wetlands above the headwaters, whether Section 404 of the Clean Water Act, *as applied* to petitioners' conduct, violates the Commerce Clause where the mere placement of topsoil and clean fill material onto such wetlands --regardless of the amount of the fill, or whether such fill material has any actual or threatened individual or cumulative impact or effect on the environment or interstate commerce-- is deemed to constitute an irrebutable presumption of an effect on interstate commerce, especially where:

i) the Corps has asserted its jurisdiction over petitioners' property solely because of its geographical nexus to a tributary of a waterway *formerly* used in interstate commerce, rather than any waterway that is currently used, or could be susceptible to use, in interstate commerce; and

ii) the Corps itself is already required under 33 C.F.R. § 328.3(a)(3) to prove a current or future effect on interstate commerce with respect to fill material placed on isolated wetlands?

3. Whether, as a matter of statutory interpretation, 33 U.S.C. § 1362(6) of the Clean Water Act, which defines "pollutants" as certain materials "discharged into water," can be construed to mean the discharge of clean fill "near water" or "onto wetlands", an issue not addressed by this Court in *United States v. Riverside Bayview Homes*?

---

* All parties to the proceeding are listed in the caption. However, respondents Mercer Wrecking & Recycling Corporation and J. Vinch & Sons, Inc. were not parties in the appeal although they did enter an appearance. *See* App. 6a, n.4.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 8

CONCLUSION 23

APPENDIX

TABLE OF AUTHORITIES

Cases:	Page
American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982)	20
Amoco Production Co. v. Village of Gambell, Alaska, 480 U.S. 531 (1987)	21
Carlyle Compressor v. Occupational Safety & Health Review Comm'n, 683 F.2d 673 (2d Cir. 1982)	22
Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984)	21
Deal v. United States, 113 S.Ct. 1993 (1993)	22
Fertilizer Inst. v. United States EPA, 935 F.2d 1303 (D.C. Cir. 1991)	21
Friends of Sakonnet v. Dutra, 739 F. Supp. 623 (D. R.I. 1990)	22
Gibbons v. Ogden, 22 U.S. (9 Wheat. 1 (1824)	8
Gregory v. Ashcroft, 111 S. Ct. 2395 (1991)	8
Hodel v. Indiana, 452 U.S. 314 (1981)	15, 16
Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981)	12, 13
Houchin v. Thompson, 438 F.2d 927 (6th Cir. 1970)	18
INS v. Cardoza-Fonseca, 480 U.S. 421 (1987)	20
McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232 (1980)	18
National Labor Relations Bd. v. Clark, 468 F.2d 459 (5th Cir. 1972)	18
New York v. United States, 112 S. Ct. 2408 (1992)	8
NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)	13
Perez v. United States, 402 U.S. 146 (1971)	13, 16
Preseault v. I.C.C., 110 S. Ct. 914 (1990)	16
Public Employees Retirement Sys. of Ohio v. Betts, 492 U.S. 440 (1989)	22
Quivara Mining Co. v. United States E.P.A., 765 F.2d 126 (10th Cir. 1985)	14, 15
Riverside Irrrigation Dist. v. Andrews, 758 F.2d 508 (10th Cir. 1985)	4
Save Our Community v. U.S. E.P.A., 971 F.2d 1155 (5th Cir. 1992)	3
State of Utah v. Marsh, 740 F.2d 799 (10th Cir. 1984)	17
TVA v. Hill, 437 U.S. 153 (1978)	20
United States v. Byrd, 609 F.2d 1204 (7th Cir. 1979)	14

United States v. Critchley, 353 F.2d 358 (3d Cir. 1965) 19
United States v. Elders, 569 F.2d 1020 (7th Cir. 1978) . 19
United States v. Lopez, 2 F.3d 1342 (5th Cir. 1993) 8
United States v. Larkins, 852 F.2d 189 (6th Cir. 1988) . 10
United States v. Mennuti, 639 F.2d 107 (2d Cir. 1981) . 19
United States v. Monholland, 607 F.2d 1311 (10th Cir. 1979) 19
United States v. Mills, 817 F. Supp. 1546 (N.D. Fla. 1993) 23
United States v. Perdue Farms, Inc., 680 F.2d 277 (2d Cir. 1982) 22
United States v. Riverside Bayview Homes, 474 U.S. 121 (1985) . . . . . *passim*
United States v. Voss, 787 F.2d 393 (8th Cir. 1986) . . . 19
Wickard v. Filburn, 317 U.S. 111 (1942) 16, 17

United States Constitution

Art. 1, Sec. 8, Cl. 3 . . . . . *passim*
Tenth Amendment 8

Statutes:

18 U.S.C. § 844(i) 19
18 U.S.C. § 922(q) 8
18 U.S.C. § 1951 19
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1331 5
28 U.S.C. § 1345 5
28 U.S.C. § 1355 5
33 U.S.C. § 1311(a) 4, 20
33 U.S.C. § 1319(b) 5
33 U.S.C. § 1319(c)(2) 2
33 U.S.C. § 1342 15
33 U.S.C. § 1344 . . . . . i, 3
33 U.S.C. § 1344(a) 5
33 U.S.C. § 1344(e) 4
33 U.S.C. § 1362(6) . . . . . *passim*
33 U.S.C. § 1362(7) 20

Regulations:

33 C.F.R. § 209.120(d)(1977) 14
33 C.F.R. § 320.1(c) 4
33 C.F.R. § 326.3(c)(1) 4
33 C.F.R. § 328.3(a)(1) 5, 14
33 C.F.R. § 328.3(a)(3) 7
33 C.F.R. § 330.5(a)(26 . . . . . *passim*

40 C.F.R. § 230.3(o)) 2, 21

Miscellaneous:

Fed. R. Civ. P. 60(b) 6
Fed. R. Evid. 201(b) 7
62 LW 2024 (July 13, 1993) 9
Br. of U.S. in Opp. Cert.,
United States v. Pozsgai, No. 89-1735 7
Reply Br. of U.S. in
U.S. v. Riverside Bayview Homes 10
Transcript, Oral Argument in
U.S. v. Riverside Bayview Homes 10

No. 93-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

JOHN POZSGAI and GIZELLA POZSGAI,
Petitioners,

v.

UNITED STATES OF AMERICA,
MERCER WRECKING & RECYCLING CORPORATION,
J. VINCH & SONS, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, John Pozsgai and Gizella Pozsgai, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-27a) is reported at 999 F.2d 719 (3d Cir. 1993). The order of the district court dated January 8, 1990 is unreported and reproduced at App. 34a The order of the district court dated June 17, 1991, denying the motion for reconsideration is unreported and reproduced at App. 28a.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1993 (App. 1a). On August 10, 1993, the court of appeals issued an order construing petitioners' letter request of July 8, 1993 as a timely motion to amend the judgment as well as a petition for rehearing and denied both. App. 39a. On September 16, 1993, Associate Justice David Souter extended the time for filing a petition for a writ of certiorari to and

including November 8, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Commerce Clause of the U.S. Constitution, Art. 1, Sec. 8, Cl. 3, provides: "Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

"Pollutant" is defined in the Clean Water Act at 33 U.S.C. 1362(6) as follows:

> The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.***

Other provision of the Clean Water Act and regulations pertinent to this case are 33 U.S.C. §§ 1311(a), 1319(c)(2), 1344(a), (e); the regulatory definition of "waters of the United States" under 33 C.F.R. § 328.3(a); the regulation of isolated wetlands and those above the headwaters under 33 C.F.R. § 330.5(a)(26); and the regulatory definition of pollutant under 40 C.F.R. § 230.3(o). These statutory and regulatory provisions are reproduced in the Appendix at App. 46a-48a.

STATEMENT OF THE CASE

Petitioner John Pozsgai, a 60-year old Hungarian emigre, is a self-employed truck mechanic who lives with his wife, Gizella, co-petitioner herein, and family in Morrisville, Pennsylvania, where he has worked seven days a week in his small garage behind his house--except for approximately a two-year period of incarceration as a result of the criminal proceedings stemming from the facts in this case.[2] Across the street from his home is a 14-acre lot which, prior to petitioners' purchase of the property in early 1987, had been used for some

---

[2] When used in the singular, "petitioner" refers to John Pozsgai.

thirty years as a dump site for various types of old fill and junk, including auto body parts and thousands of old tires. The property is zoned for light industrial use, and is bordered on the north by Bridge Street, on the south by a four-lane superhighway (U.S. Route 1), an auto salvage yard on the west, and a tire repair/dealership on the east. Petitioner saw the property not as a dumpsite, but as an opportunity. By cleaning up the eyesore, removing the old tires, and filling and leveling a small portion of the property, he could fulfill his dream of building a larger garage so he could expand his truck repair business from its cramped quarters. The government saw the matter differently.

A field agent of the U.S. Corps of Engineers (Corps) visited the property beginning in April 1987 and claimed that because of the presence of such vegetation as "skunk cabbage," a common weed, and "sweet gum trees," a common tree endemic to the Eastern third of the United States, portions of the property contained "wetlands." The site, however, is not a marsh, swamp, or bog, nor was the area listed as a wetland on the Department of the Interior's National Wetland Inventory Map. Placing fill on certain wetlands is not a prohibited activity but a regulated one under the Clean Water Act. 33 U.S.C. § 1344. Petitioner believed, however, that tires strewn throughout the tiny drainage stream (about three-feet wide and a few inches deep that trickles along the edge of the property) had a damming effect, causing a portion of the site to flood occasionally during heavy rains. By removing the tires, the property would drain properly and lose its apparent wetland vegetation characteristics.[3]

Petitioners completed the purchase of the property in June 1987 and Mr. Pozsgai continued the laborious process of cleaning up the property by removing the thousands of tires and junk parts, and allowing clean fill (non-toxic, non-hazardous, material such as topsoil, earth, bricks and inorganic materials) to be placed on portions of the upland as well as what the government claims were "wetland" portions of the property along Bridge Street. He did, however, obtain a Bucks County soil erosion permit in May 1988 and maintained a protective silt skirt fence along the small stream, making sure nothing was placed into the tiny stream.

---

[3] Draining a wetland so that it no longer comes under the Corps' jurisdiction is not prohibited under the Clean Water Act. *See Save Our Community v. U.S. E.P.A.*, 971 F.2d 1155 (5th Cir. 1992).

The Corps conceded below that the wetlands on petitioners' property were "above the headwaters," that is, that they belonged to a class or category of wetlands that were essentially isolated, being adjacent to a small stream that has a flow rate of less than five cubic feet per second. 33 C.F.R. § 330.5(a)(26). Under Corps regulations, filling of such minor wetland areas are covered by nationwide permits under 33 U.S.C. § 1344(e), and accordingly, "an application for a DA [Department of Army] permit does not have to be made." 33 C.F.R. § 320.1(c) (emphasis added). This particular Nationwide Permit No. 26 permits the filling of up to 10 acres of "above the headwaters" wetlands (well within the acreage involved in this case), as well as totally isolated wetlands. 33 C.F.R. § 330.5(a)(26).[4]

While the Corps and EPA informally advised appellant to refrain from further filling activity and seek an after-the-fact permit, for reasons best known to the government, they never issued any formal cease and desist *order* as they do in other cases and as required by their own regulations. 33 C.F.R. § 326.3(c)(1), (3). Nor did any Corps officials believe the threat to the environment of the clean fill was so great that they felt it necessary to order or even inform the haulers, respondents Vinch and Mercer, who were the ones actually discharging the fill dirt over a period of a year or so, to stop their activity.

On August 18, 1988, special agents of the Environmental Protection Agency installed a secret video surveillance camera in a private home across the street from the property. In addition, aerial surveillance photographs were being taken of the property. On August 24, 1988, the government filed this civil action alleging in its complaint that petitioners and the haulers had violated the § 301 of the Clean Water Act, 33 U.S.C. § 1311(a) by discharging "pollutants" without an individual fill permit under Section 404 of the CWA, 33 U.S.C. § 1344(a),

---

[4] As one court accurately noted:

> A nationwide permit is one covering a category of activities occurring throughout the country that involve discharges of dredge or fill material that will cause *only minimal adverse effects* on the environment when performed separately and that will have only *minimal* cumulative effects. *See* 33 U.S.C. § 1344(e) (1). Such a permit *is automatic* in that if one qualifies, *no application is needed before beginning the discharge activity*.

Riverside Irrigation Dist. v. Andrews, 758 F.2d 508, 511 (10th Cir. 1985) (emphasis added).

into wetlands that are adjacent to a "unnamed tributary of the Pennsylvania Canal" which the government alleged in its complaint was a "'water of the United States' as defined by the Department of the Army regulations at 33 C.F.R. § 328.3(a)(1)." The complaint sought the imposition of fines, preliminary and final injunctive relief. Jurisdiction in the district court was predicated on 28 U.S.C. §§ 1331, 1345, 1355, and 33 U.S.C. § 1319(b). At the same time, the government applied for and received a Temporary Restraining Order issued prohibiting the "discharging [of] fill material onto the site" App. 45a. On September 2, 1988, an Order To Show Cause was issued by at the request of the government to hold petitioner in civil contempt for allegedly violating the TRO. App. 44a.

It is undisputed that all filling activities on the property ceased by September 3, 1988, and a hearing on both the contempt and the preliminary injunction was held on September 9, 1988 before the district court and was continued until September 16, 1988. In the meantime, on September 12, 1988, although no further filling activities had taken place, federal agents arrested Mr. Pozsgai, handcuffed him, and booked him for violating the Clean Water Act by allowing clean fill (non-toxic, non-hazardous material such as earth, bricks, topsoil) to be placed on his property without first obtaining government permission in the form of an individual permit under 33 U.S.C. § 1344(a).

At the conclusion of the September 16, 1988 hearing, the court found that it was "more probable than not" that Mr. Pozsgai was the person on the machine for 10 or 15 minutes levelling the fill, and that he approved the filling activity. App 5a, 25a. The district court, rather than warning him of possible penalties should the TRO be violated, ordered petitioner to pay $5,000 "in 48 hours or Mr. Pozsgai goes to jail." App. 5a. The court also granted the government's preliminary injunction.

On December 16, 1988, a final hearing on the matter was heard by the civil court.[5] The government witnesses testified

---

[5] In the meantime, Mr. Pozsgai was required to defend himself in parallel criminal proceedings, and was convicted on 40 counts of placing clean fill on his property without a permit on December 30, 1988. Invoking then-President Bush's "no net-loss of wetlands" pledge, the prosecutor asked for and received a three-year unsuspended prison term for the pre-Guideline counts, 27-months for the post-Guideline counts, a $200,000 fine, and 5-years probation. That unprecedented sentence and fine was one of the longest unsuspended prison terms in the history of the United States for *any* environmental offense, and

(continued...)

that the property contained wetlands based on the three-parameter approach: vegetation, hydrology, and hydric soils. Petitioners' primary defense was that while the property may have exhibited certain wetland characteristics such as vegetation, the removal of the tires and the draining of the property changed the hydrology component of the site, and that the purported wetland area was not sufficiently adjacent to the stream to come within the jurisdiction of the Corps.

On January 8, 1990, over a year later, the district court issued a permanent injunction in favor of the government. App. 38a. Petitioners filed a timely motion to reconsider on January 26, 1990, raising essentially three points: 1) that the government did not prove the existence of federal jurisdiction over the property because of the lack of showing a sufficient interstate commerce connection to the activity; 2) that even if there were federal jurisdiction over the property, the Clean Water Act only prohibits the discharge of "pollutants" without a permit, which are defined by statute as well as by an EPA regulation to mean only certain substances discharged "into water," not "onto wetlands"; and 3) that in any event, appellants were not required to obtain a fill permit under Section 404(a) of the CWA as alleged by the government, because their property was above the headwaters and thus, was covered by a nationwide permit issued under Section 404(e).

A year and half later, the district court denied the motion on June 17, 1991, and issued a implementation order. App. 28a A motion under Fed. R. Civ. Proc. Rule 60(b) seeking relief of that order was denied by the court on February 25, 1992, and on April 1, 1992, final judgment was entered in this case, and a timely appeal was filed.

On June 25, 1993, the court of appeals, after having failed in the criminal case to give petitioner any oral argument or an opinion, issued its decision in this case affirming the judgment. Writing for the court, Judge Anthony Scirica[6] rejected

---

[5] (...continued)
the largest individual fine. Even toxic polluters that have caused serious damage to the environment or even injured people, were given probation, modest fines, or a few months in prison. Petitioner's sentence was also greater than that given to most criminals in the federal system for many drug offenses, robbery, arson, extortion, and other *malum in se* crimes.

[6] Judge Scirica was the only common member of the panels in both the criminal and civil, and was the judge who summarily affirmed the criminal appeal for the court.

petitioners' argument that they did not discharge "pollutants" "into water" as that term is defined in 33 U.S.C. § 1362(6) because this Court in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), had interpreted a different statutory provision, namely "waters of the United States" to include certain wetlands. Therefore, the statutory term "into water" can be interpreted to mean "onto wetlands."

The court also rejected petitioners' argument that under the Commerce Clause, there was no showing or nexus of petitioners' property to interstate commerce by taking judicial notice under Fed. R. Evid. 201 that the canal was used to transport coal in the 1800's, and thus concluding that the Pennsylvania Canal "*was* used in interstate commerce, which satisfies the terms of [33 C.F.R.] § 328.3(a)(1)." (emphasis added). That regulatory section defines "waters of the United States as those waters "which are currently used, *or were used in the past*, or may be susceptible to use in interstate or foreign commerce...." *Id.* (emphasis added).[7] The court of appeals rejected petitioners' claim that the government failed how petitioners' property affects any interstate commerce, stating that such jurisdiction is irrebuttably presumed because "[u]nder the [Corps'] regulation, the requisite interstate commerce nexus was established because the wetlands were adjacent to a tributary of a waterway formerly used in interstate commerce." App.[8]

---

[7] No such judicial notice was taken in the criminal case, nor could it since Fed. R. Evid. 201 prohibits the taking of judicial notice in criminal trials tried to a jury. Furthermore, petitioners argued that the government, in recycling its appellate brief from the criminal appeal to the district court in the civil case on petitioners' rehearing motion, recycled a misrepresentation to the district court that the aerial photographs in the case show that the stream on petitioners' property "flows into the Pennsylvania Canal." That misrepresentation of a key jurisdictional fact was brought to this Court's attention by then-Solicitor General Kenneth Starr who conceded that "that representation, we have now determined, *was inaccurate*. *U.S. v. Pozsgai*, No. 89-1735, U.S. Opp. Cert. Brief at 9, n.6 (emphasis added). In the court of appeals decision in the case at bar, the court stated that the "government has since conceded the photographs are inaccurate." App. The photographs are not inaccurate; they accurately depict what they shows. What was inaccurate was the governments' *representation* to the courts below as to what the photographs in fact depict. Petitioners' attempt to have the court of appeals amend its decision to correct this inaccurate statement was rejected.

[8] The court also rejected petitioners' other arguments on other issues in the case which are not the subject of this petition and therefore need not be discussed.

REASONS FOR GRANTING THE PETITION

Congress no doubt has broad powers to legislate under the Commerce Clause; however, that power is not without its limits as both this Court and numerous courts of appeals have steadfastly recognized. *Gibbons v. Ogden*, 22 U.S. (9 Wheat. 1 (1824); *Wickard v. Filburn*, 317 U.S. 111, 125 (1942)(local activity may be regulated if "it *exerts* a *substantial economic effect* on interstate commerce")(emphasis added). Recently, the Fifth Circuit had occasion to remind us of James Madison's words from Federalist No. 45:

> 'The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.' * * * It is easy to lose sight of all this in a day when Congress appropriates trillion-dollar budgets and regulates myriad aspects of economic and social life.

United States v. Lopez, 2 F.3d 1342, 1345 (5th Cir. 1993).[9]

If the Third Circuit opinion in this case is allowed to stand, the Commerce Clause will have lost all meaning, for any activity, however local or remote from any nexus to interstate commerce, can be federalized (and, as this case starkly illustrates, criminalized). Indeed, the court of appeals' fig leaf for the federal government's Commerce Clause jurisdiction over petitioners' property is most remarkable: the alleged nexus to interstate commerce is not predicated upon any allegation by the government that the placement of clean fill on petitioners' property hundreds of yards from a drainage stream *does* exert, or can reasonably be expected *to exert,* an effect on interstate commerce; rather, the nexus arises *solely* from the geographical and historical fact that petitioners' property is adjacent to drainage ditch or stream that is a *tributary* of a waterway that *was* used in interstate commerce in the 1800's.

---

[9] The *Lopez* court, relying heavily on Justice O'Connor's observation on dual sovereignty between the States and Federal Government under the Tenth Amendment in *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399 (1991) and *New York v. United States*, 112 S. Ct. 2408 (1992), *id.* at 1346, unanimously dismissed an indictment brought under 18 U.S.C. § 922(q) which prohibits the possession of a handgun within a school zone, because there was no allegation or showing of any nexus of that activity to interstate commerce, anymore than the possession of "lead pencils, 'sneakers,' Game Boys, or slide rules." *Id.* at 1367.

Under this radical theory of *historical* interstate commerce, the federal government could exercise jurisdiction over a person's back yard if it were shown that a rail line once ran through or near the property, or that the property was near an old pony express route. Surely such expansive federal authority cannot be based even under the most elastic reading of the Commerce Clause, nor can it be tolerated by this or other federal courts of limited jurisdiction. For if the court of appeals is correct that a federal government agency can regulate local activity merely because of its geographical nexus to *historical* channels of interstate commerce, the federal government could, *a fortiori*, easily exercise jurisdiction over any and all activity and conduct of every person or household that happens to be geographically connected to a *current* interstate highway system via their driveways or sidewalks.

This case thus presents the Court with an extremely important constitutional issue on the reach of federal jurisdiction under the Commerce Clause which has grave consequences on the thousands of private property owners whose back yards, or one-quarter acre lots, found to contain wetlands, are subjected to strict and overly burdensome federal land use controls under the Clean Water Act without so much as a whiff of any impact on interstate commerce. Furthermore, the Third Circuit has seriously misconstrued this Court's opinion in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), both with respect to its reach under the Commerce Clause as well as the statutory interpretation of the term "pollutant" which was not even an issue in that case.[10]

1. In *Riverside Bayview Homes*, the property owner challenged the Corps' definition of "waters of the United States" that included the developer's property which this Court acknowledged was part of a wetland that "*actually abuts* on a *navigable* waterway." *Id.* at 135.(emphasis added) This Court said that it may be one thing for Congress in 1972 to have intended when it enacted the Clean Water Act to regulate at least "some waters that would not be deemed 'navigable' under the classical understanding of that term," that is, those "which might not satisfy traditional tests of navigability," [e.g, non-navigable rivers or streams], but it was quite another thing to

---

[10] The importance of this case to the public and regulated community is further underscored by the widespread public interest it has generated. *See, e.g.*, U.S. Law Week, New Court Decisions: Digests of Significant Opinions Not Yet Generally Reported, 62 LW 2024 (July 13, 1993).

interpret "waters" to include wetlands "adjacent to waters as more *conventionally* defined." *Id.* at 133. (emphasis added). Thus, the "classical", "traditional" and "conventionally defined" waters were those considered "navigable". This Court deferred only to the Corps' determination that wetlands "adjacent to *navigable* waters do as a general matter" play a role in water quality. Id. (emphasis added). The Court was not faced with a situation such as this one, and numerous other situations like it, where the Corps seeks to regulate wetlands *not* adjacent to a navigable waterway as traditionally defined, but, adjacent to a tributary (the small drainage stream) of an undisputed *non*-navigable waterway (the Pennsylvania Canal). As one circuit judge has aptly noted, to read *Riverside* as sanctioning the Corps' jurisdiction over all wetlands adjacent to any stream, no matter how small, would impermissibly:

> detach[ ] and untie[ ] the 'wetlands' jurisdiction of the Corps from any concept of 'open waters' or navigable waters. A farmer's low lying farmland or a homeowner's low lying backyard-adjacent to a small stream or creek but many miles from any navigable waterway-has apparently been converted into government property no longer subject to control or improvement by the owner without government permission. A statute that does not mention 'wetlands' has apparently been read to include simply "moist land adjacent to a creek."

United States v. Larkins, 852 F.2d 189, 193-94 (6th Cir. 1988) (Merrit, J., concurring). As Judge Merritt's opinion correctly suggests, wetlands such as those in the case at bar are essentially isolated ones, and the Supreme Court "d[id] not express any opinion on that question." *Riverside Bayview*, 474 U.S. at 131, n.8.[11]

a. Even under a broad interpretation of *Riverside Bayview*, the Corps' definition of various categories of adjacent wetlands cannot be considered a reasonable interpretation of the Clean

---

[11] Indeed, in *Riverside*, the government was careful both in its brief and at oral argument to emphasize to this Court that the property in question actually abutted a *navigable* waterway. *See* United States Reply Br. at 8 ("wetlands adjacent to *large areas of open water such as Lake St. Clair*" perform important environmental functions")(emphasis added); Transcript of Oral Argument 16, Oct. 16, 1985 (Gov't counsel: property in question is "not a low lying back yard" but "an adjacent wetland, adjacent--by adjacent, I mean it is *immediately next to*, abuts, adjoins, borders, whatever other adjective you might want to use, *navigable* waters of the United States")(emphasis added).

Water Act unless the Corps were able to determine that "in the *majority* of cases, [those categories of] adjacent wetlands have *significant effects* on water quality and the aquatic ecosystem." *Id.* at 135, n.9 (emphasis added). It must be remembered that the Clean Water Act was never intended to be a Wetlands Protection Act, and that the regulation of certain wetlands is merely a means to an end, not an end in and of itself. Thus, as the Corps itself recognized, and as Riverside Bayview acknowledged, the concern is not so much with the effect of fill material on the wetlands themselves, but the effect that fill has on "the water quality of the *other* waters" within the aquatic system. *Id.* at 134.

Thus, *Riverside Bayview* did not hold that every aspect or proviso of the Corps' regulatory program was beyond a Commerce Clause challenge, either on its face or as applied. Indeed, neither the Court nor the parties directly addressed the Commerce Clause issue in that case; none of the Court's Commerce Clause cases were even cited in its opinion. Rather, *Riverside Bayview* addressed the narrower issue raised by the petitioner: whether the Corps' definition of "waters of the United States" to include certain wetlands was a reasonable interpretation of the statute. It is one thing to conclude that an agency's interpretation of a statutory term is reasonable; it is quite another to determine whether such an interpretation implicates the Commerce Clause, and, if so, what burden the government must constitutionally satisfy when invoking the injunctive powers of federal courts over what has traditionally been thought to be a matter of local land use control. The court of appeals apparently believes that the government is not even be required to pay lip service to the Commerce Clause because its jurisdiction is automatic and unrebuttable.

Petitioners contend, however, that their property containing wetlands above the headwaters are functionally and legally equivalent to isolated wetlands, a category of wetlands which this Court expressly did not address in *Riverside*. 474 U.S. at 131, n.8. The Corps has conceded, and lower courts have acknowledged, that as a general matter, such wetlands have little, if any, effect on water quality.[12] Accordingly, there can be no showing that in a "majority" of those kinds of wetlands, the placement of fill on them would have "significant effects" on water quality or interstate commerce, either singly or

---

[12] See note 4, *infra*.

cumulatively. *See Riverside Bayview*, 474 U.S. at 135, n.9. Under this Court's Commerce Clause jurisprudence, the government has thus exceeded its powers because no rational basis has been established by the agency to justify regulating this category of wetlands, namely, these essentially isolated wetlands above the headwaters. Viewed another way, if the impact of water pollution on interstate commerce was the perceived evil Congress sought to address, the means chosen here by the agency to address that problem --the regulation of clean fill material on wetlands above the headwaters-- are not reasonably adapted to that end, and therefore, exceed the authority granted by the Commerce Clause.

At a minimum, the government must show a demonstrable or reasonably threatened impact of the fill material on interstate commerce (as it currently does for isolated wetlands), rather than presume a metaphysical one before invoking injunctive powers of federal courts over the property. Other circuit courts have found it necessary to do so in the context of other statutes that Congress has enacted which, like the Clean Water Act, were enacted the full extent of its powers under the Commerce Clause.

b. The court of appeals, while citing in passing to this Court's decision in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), seriously misapplied the reasoning in that case. In *Hodel*, an association of coal producers raised a commerce clause challenge to the "steep slope" provisions of the Surface Mining Act (SMA) that required, *inter alia*, coal companies to restore mined land to original contours. The Court reiterated its traditional two-part test to determine whether the provision *on its face*, in a *pre-enforcement challenge* (unlike the as applied, post-enforcement challenge here), is a valid exercise of Congress' Commerce Clause power: (1) that Congress must have a rational evidentiary basis in concluding that an activity has an effect on interstate commerce; and, (2) the means selected by Congress to address those effects must be reasonable and appropriate. *Id.* at 2360. The *Hodel* Court concluded that "in light of the evidence before Congress and the detailed consideration that the legislation received, we cannot say that Congress did not have a *rational basis* for *concluding* that surface coal mining has *substantial effects* on interstate commerce." *Hodel*, 452 U.S. at

2360 (emphasis added).[13] The Court then analyzed the means selected and concluded that the district court was correct in finding that the specific provisions of the SMA being challenged in that case were "all" reasonably "necessary to deal with the interstate commerce effects of surface coal mining." *Id.* at 2364. Thus, the Court did not consider and sanction every regulatory measure found in the SMA, but focused on the "steep slope" requirement before it.

In his concurrence, then-Associate Justice Rehnquist surveyed the Court's Commerce Clause jurisprudence and was careful to note the limits that clause places on the Congress:

> [I]t would be a mistake to conclude that Congress' power to regulate pursuant to the Commerce Clause is unlimited. Some activities may be so private or local in nature that they simply may not be in commerce. Nor is it sufficient that the person or activity reached have *some* nexus with interstate commerce. Our cases have consistently held that the regulated activity must have a *substantial* effect on interstate commerce. *E.g., NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S., at 37, 57 S. Ct., at 624 (local activities may be regulated if they have a "close and substantial relation to interstate commerce"). Moreover, simply because Congress may conclude that a particular activity *substantially* affects interstate commerce does not necessarily make it so. Congress' findings must be supported by a "rational basis" and are reviewable by the courts. *Cf. Perez v. United States*, 402 U.S., at 157, 91 S. Ct., at 1363 (STEWART, J., dissenting). In short, unlike the reserved police powers of the States, which are plenary unless challenged as violating some specific provision of the Constitution, the connection with interstate commerce is itself a jurisdictional prerequisite for any substantive legislation by Congress under the Commerce Clause.

---

[13] The *Hodel* Court also found support in the fact that "coal is a commodity that moves in interstate commerce" and that Congress determined that it was necessary to "protect interstate commerce from the adverse effects that may result from that activity." 452 U.S. at 281. The skunk cabbage and other vegetation on petitioners' property are not articles of commerce; nor was there any allegation or finding that petitioners' property, located as it is in the middle of an industrial and urban area, supports fish and wildlife used in interstate commerce.

Id. at 310-11 (1981) (Rehnquist, J., concurring) (footnote omitted) (emphasis in original and supplied); *see also id.* at 305 (Burger, C.J., concurring) ("law enacted by Congress under the Commerce Clause must be based on a substantial effect on interstate commerce").

Notably, the majority opinion in *Hodel*, as well as the court of appeals in this case, cited *United States v. Byrd*, 609 F.2d 1204 (7th Cir. 1979) with approval. App. 22a. In *Byrd*, the Seventh Circuit, in an *as applied* challenge, examined the particular wetland area in question and made a finding of fact that the destruction of those particular wetlands adjacent to Lake Wawasee could likely have a "*substantial economic* effect on interstate commerce" because the Lake attracts interstate travelers for fishing and swimming. *Id.* at 1210 (emphasis added). The Seventh Circuit then made the following legal conclusion:

> We conclude that Congress constitutionally may extend its regulatory control of navigable waters under the Commerce Clause to wetlands which adjoin or are contiguous to intrastate lakes *that are used by interstate travelers* for water-related recreational purposes as defined by 33 C.F.R. § 209.120(d) (2) (i) (g) and (h) (1977).

Id. (emphasis added). The court then performed the second-part of the Commerce Clause analysis by considering whether the means chosen were a reasonable measure towards Congress' goal of maintaining water quality (not of the wetland, but "of the lake") and concluded that it did. *Id.* No such factual findings or analysis were made in the case at bar.

The court of appeals' reliance on *Quivara Mining Co. v. United States E.P.A.*, 765 F.2d 126, 130 (10th Cir. 1985), App. 18a, is similarly misplaced. In *Quivara*, pollutants from uranium mining operations were discharged *directly into two creeks*; substantial evidence existed showing that there was a direct surface and underground connection between those two creeks and "navigable-in-fact" streams, *id.* at 130, [*i.e.*, 33 C.F.R. § 328.3(a) (1) waters], suggesting that the pollutants were transported to the interstate waterway. Only under those circumstances was this particular "impact on interstate commerce . . . sufficient enough to satisfy the commerce clause." *Id.* at 130. Furthermore, *Quivara* did not involve the Section 404 permit program, but the National Pollution Discharge Elimination System program under Section 402, 33 U.S.C. § 1342 involving discharges of pollutants directly into waterways, and which is the primary statutory and regulatory

scheme for controlling the amount of pollutants discharged into our nation's waterways.

In *Quivara* and similar cases, unlike the case at bar, there were *direct* impacts by the polluting activity on interstate commerce. In the case at bar, no fill material was placed into the adjacent drainage stream. In fact, petitioners removed hundreds of tires and rubbish *from* the stream and property, and placed a silt skirt protective fence along its banks, such that the stream runs *clearer* due to petitioners' clean-up efforts. Furthermore, there was no evidence at trial that any of the clean fill placed on the property, hundreds of yards away from the tiny stream, would ever end up in the stream. The case law thus suggests that an actual or likely effect on interstate commerce must be found, not some sort of hypothetically remote possibility as is the case here.

Hodel v. Indiana, 452 U.S. 314 (1981), the companion case to *Hodel v. Virginia*, is more instructive to the case at bar. That case involved a commerce clause challenge against the "prime farmland" provisions of the Surface Mining Act and 15 other separate substantive provisions. The court made a careful analysis of the evidence presented before the Congress concerning the impact of surface mining on prime farmland, and found that Congress had a "rational basis for finding that surface coal mining on prime farmland affect interstate commerce in agricultural products." *Id.* at 326. As for the second prong of the test, the Court then found that *each* of the specifically challenged provisions of the Act were reasonably related to the legitimate goal "of protecting interstate commerce from adverse effects attributable to surface coal mining." *Id.* at 329.

In the case at bar, if one substitutes "non-prime wetlands" (*i.e.*, those wetlands adjacent to waters above the headwaters) for "prime farmlands", it becomes quite evident that Congress not only lacked *any* evidentiary basis for regulating such wetlands in 1972 or even in 1977--let alone a rational one--but also that the agency itself recognized the preservation of such wetlands, as a class or category of wetlands, to be insignificant in relation to water quality and interstate commerce. Accordingly, they are not an integral part to achieving Congress's primary goal of restoring water quality.[14] In short,

---

[14] Significantly, in *Hodel v. Indiana*, Congress expressly enacted into law the regulations of the Department of Agriculture defining the term "prime farmland," which further evidences Congress' intent. 452 U.S. at 452, n.1.

(continued...)

the regulation of these wetlands fails to satisfy either the rational basis or reasonable means tests because there is simply no record evidence showing that impacts on interstate commerce through water pollution are attributable to placing clean fill on these essentially isolated wetland areas.

c. The lower court also seriously misconstrued this Court's decisions in both *Wickard v. Fillburn*, 317 U.S. 111 (1942) and *Perez v. United States*, 402 U.S. 146 (1971) with respect to the reach of federal jurisdiction under the Commerce Clause. The activities sought to be regulated in both *Wickard* and *Perez* were economic activities: in *Wickard*, the withdrawal from the wheat market of those potential buyers who consume their home grown wheat, and in *Perez*, the high economic cost attributable to loan-sharking that Congress found to be a $350 million dollar a year activity. Thus, this Court necessarily aggregated the activity in order to assure itself that the conduct sought to regulated had a "substantial effect" on interstate commerce. Obviously, if the problem were found to be a minor one, or localized wholly within one state, federal jurisdiction would be lacking.

The instant case, on the other hand, does not involve any conduct that can be characterized as constituting economic or commercial activity, or one that can be nationally aggregated. The court of appeals simply *assumed* that the Corps has made a determination that "discharge into wetlands above the headwaters. . . increases water pollution" when in fact, the Corps has suggested that such discharges have little, if any, effect on water quality, and hence, even less so on interstate commerce, by issuing Nationwide Permit No. 26 under 33 C.F.R. 330.5(a)(26). Thus, minor or trivial discharges of fill onto wetlands above the headwaters in one aquatic system cannot be aggregated with trivial discharges in another aquatic system. Nothing times nothing is still zero; whereas in *Perez* and *Wickard*, the cumulative impact on the national economy (and hence interstate commerce) was arguably demonstrable.

---

[14] (...continued)
In this case, Congress has not adopted any definition of wetland, and it is unlikely Congress would consider "non-prime wetlands" to be of importance; *Cf. Preseault v. I.C.C.*, 110 S. Ct. 914, 926 (1990) (rejecting Commerce Clause facial challenge to National Trails System Act converting abandoned rails to hiking trails where Congress believed that "*every* [rail] line is a potentially valuable national asset that merits preservation.") (emphasis added).

As for the discharge of fill on wetlands above the headwaters within the same aquatic system as petitioners, that activity may very well, as a factual matter, be properly subjected to an aggregation analysis as the court of appeals suggested; but the Corps has never indicated what that aggregate impact may be. Indeed, Nationwide Permit 26 itself recognizes that minor filling of such wetlands as a class do not individual, or cumulatively impact negatively on water quality. Hundreds of companies in petitioners' aquatic system near industrialized Philadelphia are permitted by the government under Section 402 to discharge millions of gallons of waste and chemicals directly *into* the water; the cumulative impact of petitioners' activity of placing clean fill on land far from any water has about as much cumulative impact on water quality in this aquatic system as would the discharge of a handful of sand in the ocean. Under the court of appeals' rationale, the EPA could promulgate a regulation under the Clean Air Act to limit air pollution by requiring individuals to apply for a federal permit if they desired to prune a tree in their backyard because each branch has leaves on it, which in turn may help to trap air pollutants.

2. If regulation of these essentially isolated areas are, as a general matter, a valid exercise of Commerce Clause power, and the means chosen proper to implement the law are reasonable, petitioners nevertheless submit that as a matter of law, the agency has the burden of proving an interstate commerce impact just as it does in the analogous context of totally isolated waters. At a minimum, the presumption of interstate commerce must be a rebuttable one.

The Corps' historical parallel and equal treatment of effectively or essentially isolated waters (waters and adjacent wetlands above the headwaters), with actually isolated waters and intrastate wetlands, *see*, 33 C.F.R. §§ 330.5(a) (26) (i) and (ii), is compelling evidence that both should also be treated the same with respect to the burden of proof that an agency must bear on a case-by-case basis regarding the impact of the wetland area on interstate commerce. It is illogical to recognize that the Corps has the burden of proving an interstate commerce impact with respect to fill material dumped directly *into* Utah Lake (*State of Utah v. Marsh*, 740 F.2d 799 (10th Cir. 1984)), yet it can hide behind an irrebuttable presumption that a sufficient interstate commerce impact exists from the placement of topsoil or clean fill on a marginal wetland hundreds of yards from a trickling stream that eventually reaches a non-navigable canal once used in interstate commerce in the 1800s. The Commerce

Clause may be elastic, but it is not silly putty to be stretched by government agencies to impose federal authority over any activity that the agency feels should be in its domain. At a minimum, *both* categories of wetlands should be treated the same for Commerce Clause purposes.

Indeed, the court of appeals seriously departed from the teachings of this Court and the practice of its sister circuits by failing to analyze what affect, if any, on interstate commerce is caused by the petitioners' placement and maintenance of clean fill material on their property. In *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232 (1980), for example, this Court ruled that with respect to a Sherman Act violation:

> [I]t is not sufficient merely to rely on identification of a relevant local activity and *to presume* an interrelationship with some unspecified aspect of interstate commerce. To establish jurisdiction a plaintiff must allege the critical relationship in the pleadings and if these allegations are controverted must proceed to demonstrate. . . either that the defendants' activity is itself in interstate commerce or, if it is local in nature, that it has an effect on some other *appreciable* activity *demonstrably* in interstate commerce * * * * [I]t would be sufficient for petitioners to demonstrate a *substantial* effect on interstate commerce generated by respondent's brokerage activities.

444 U.S. at 242 (emphasis added).

Other circuits similarly require a showing of at least a *de minimis* effect or nexus to interstate commerce, a burden which admittedly may easily be satisfied in most cases, but nevertheless, a pre-requisite to the exercise of federal jurisdiction under the Commerce Clause. For example, in *National Labor Relations Bd. v. Clark*, 468 F.2d 459 (5th Cir., 1972), the Fifth Circuit, while noting that, "in passing the National Labor Relations Act, Congress intended to provide the Board with the fullest jurisdictional power constitutionally permissible under the Commerce Clause," nevertheless concluded in that case that there was no evidence that the nursing home's activities affected interstate commerce.[15]

---

[15] *See also Houchin v. Thompson*, 438 F.2d 927 (6th Cir. 1970) (Fair Labor Standards Act not applicable to certain workers who were not engaged in interstate commerce, but at best "inconsequential incident of interstate commerce happens to result from the general conduct of intrastate activity") *United States v. Elders*, 569 F.2d 1020 (7th Cir. 1978) (no nexus shown

(continued...)

The court of appeals attempts to dismiss all of these cases out of hand because Congress explicitly placed the Commerce Clause connection in those particular statutes, whereas in the Clean Water Act, the Corps (not even the Congress) has allegedly made an across-the-board determination that all wetlands adjacent to "tributaries of waters usable *or formerly used* in interstate commerce themselves affect interstate commerce." App. 22a (emphasis added). Apparently, Congress could learn something from the Corps and simply cure the shortcomings in the federal arson, bribery, and other laws and make prosecutions a lot easier by simply declaring that Congress finds that *all* arson, *all* briberies, all (fill-in-the blank undesirable activity), affect interstate commerce. Clearly, the Commerce Clause prerequisites are to be read into any federal statute (unless, of course, if the legislation is supported by some other Article 1 or constitutional power), although many statutes codify that requirement. In fact, the Corps has never made any express determination that the class of wetlands involved in this case, let alone those on petitioners' property, affects interstate commerce as the lower court suggested that it had; indeed, the Corps has indicated quite the opposite, declaring that such wetlands have little, if any, effect on water quality. And to the extent that the Corps had made any finding that wetlands adjacent to waterways *formerly* used in interstate commerce has a *current* effect on interstate commerce, such a finding is *per se* unreasonable.

---

[15] (...continued)
between kickbacks and interstate commerce); *United States v. Voss*, 787 F.2d 393, 397 (8th Cir. 1986) (a federal arson statute, enacted by Congress "to exercise its fullest, constitutionally permissible jurisdictional reach" was unconstitutionally applied where the government was unable to show a nexus between the property and its use in interstate commerce, and that the purchase of fire insurance from an interstate carrier was not even a *de minimis* impact on interstate commerce.) *United States v. Mennuti*, 639 F.2d 107 (2d Cir. 1981) (bombing of residential home not shown to have any effect on interstate commerce); *United States v. Monholland*, 607 F.2d 1311, 1316 (10th Cir. 1979)(18 U.S.C. § 844(i) does not reach conspiracy to bomb truck used by state judge to go to work because vehicle is wholly immaterial to what judge does at work, and it is not "at all clear that what [state judge] does even resembles commerce" and therefore, "it is impossible to say that the truck affects commerce." *United States v. Critchley*, 353 F.2d 358 (3d Cir. 1965) (insufficient evidence to show a violation by the defendant who extorted money from a roofing trade organization under the Hobbs Act, 18 U.S.C. § 1951, which prohibits certain acts that "in any way or degree. . . affects" interstate commerce; the evidence did not show how particular bribe affected interstate commerce).

3. Finally, this Court should grant the petition because the lower court departed from fundamental teachings of this Court regarding statutory interpretation by interpreting the definition of "pollutant" in 33 U.S.C. § 1362(6) which includes the operative phrase "discharged into water" to mean discharged "onto wetlands." This is an important question of statutory interpretation which has never been addressed by this Court nor any other court.

While it is true as the court of appeals found that this Court in *Riverside Bayview Homes* held that the statutory term "waters of the United States" under 33 U.S.C. 1362(7) included certain adjacent wetlands for purposes of determining the extent of the Corps' geographical jurisdiction, nevertheless, the Court did not address the question as to what conduct or activity thereon is covered by the Act.

The operative section of the Clean Water Act is found in 33 U.S.C. § 1311 which states:

> **Section 1311. Effluent limitations**
>
> **(a) Illegality of pollutant discharges except in compliance with law.** Except as in compliance with this section and Sections 302, 306, 307, 318, 402, and 404 of this Act [33 U.S.C.S. §§ 1312, 1316, 1317, 1328, 1342, 1344], the discharge of any *pollutant* by any person shall be unlawful. (emphasis added).

Accordingly, the government was required to prove that the petitioners illegally discharged pollutants. "Pollutant" is defined in 33 U.S.C. § 1362(6) as follows:

> (6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged *into water*. (emphasis added).

The cardinal principle of statutory construction is that the language chosen by the Congress be given its plain meaning. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982); *TVA v. Hill*, 437 U.S. 153 (1978); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447-48 (1987). If the statutory language is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress...." *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

The term "pollutant" is defined in terms of specific substances being discharged "*into water*." The language is clear and unambiguous. It does not read "discharged into waters of the United States," or "navigable waters," or "wetlands," or "moist soil," or "dry land that the Corps determines to be water," but "water," as that term is commonly understood: the liquid state of H_2O.[16] The definition also uses the prepositional phrase "into water," not "near water" or "adjacent to water" or "onto wetlands." Both words, "into" and "water," singly and as a phrase, have a clear and unambiguous meaning that does not include placing fill dirt onto wetlands. Admittedly, top soil and earth were placed onto petitioners' property, but is putting "earth" onto other "earth" or "wetlands" what Congress meant by a discharging a "pollutant" "into water"? Clearly not. Nor does the Corps of Engineers or the EPA have any other regulatory definition of the term "pollutants" or "water." [17] Accordingly, interpreting the words "into water" to mean exactly that, is the only permissible judicial construction of those two words, as courts in the following analogous cases have so held.[18]

The court of appeals concluded that the term "water" can be interpreted to mean "wetlands" because this Court had interpreted "waters of the United States" in *Riverside Bayview Homes* to include certain wetland areas. This Court held only

---

[16] "Water" is defined as "the liquid of which seas, lakes, and rivers are composed and which falls as rain and issues from springs. When pure it is transparent, colourless (except as seen in large quantity, when it has a blue tint), tasteless and odourless." 2 *Oxford English Dictionary* 3701 (Compact Ed. 1971).

[17] The Corps has no regulatory definition of "pollutant"; the EPA which exercises jurisdiction over wetlands under the Clean Water Act also defines "pollutant" as certain materials "discharged into water." 40 C.F.R. 230.3(o). Accordingly, no *Chevron* deference is due to either of these two agencies for any other interpretation of "pollutant" than the one found in the statute.

[18] *See, e.g., Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531 (1987)(in interpreting the meaning of the term "in Alaska," this Court unanimously rejected the Ninth Circuit's ruling that the term "in Alaska" should be interpreted "in a general, 'nontechnical' sense to mean the geographic region of Alaska); *Fertilizer Inst. v. United States EPA*, 935 F.2d 1303 (D.C. Cir. 1991) (the term "release" in CERCLA was statutorily defined as discharging, dumping, or disposing hazardous wastes "*into* the environment"; hence, EPA regulation defining a "release" as the placement of a substance into a facility that is "*exposed to* the environment" (emphases added) must be struck down as violative of plain language)

that the statutory phrase, "waters of the United States" can be interpreted by the Corps to include "shallows, marshes, mudflats, swamps, bogs" and similar areas. 474 U.S. at 132 Yet many of these areas, like the swamps, bogs, Everglades, bayous, etc., have standing water on them, and hence, the placement of fill material on such aquatic sites would still be regulated by the Corps under the Clean Water Act even if "into water" is given its plain meaning.

When Congress enacted the Clean Water Act in 1972, there was no mention at all of wetlands in either the legislation or its legislative history; therefore, Congress' definition of "pollutant" as being the discharge of certain substances "into water" makes perfect sense. Interpreting "water" as a liquid would certainly allow the government to continue regulating the discharge of pollutants into our nation's territorial seas, bays, lakes, ponds, reservoirs, rivers, and streams under Section 402, the primary method of controlling water pollution. This interpretation would also allow regulation of the discharge of fill material into familiar wetlands under Section 404 such as estuaries, swamps, bayous, everglades, and marshes which usually are covered with water. If, however, the government fears that the plain meaning of the statute would limit the reach of the Clean Water Act to only 95 percent of the "waters of the United States" that the Corps and EPA wish to regulate, those agencies should at least amend their regulations or, more appropriately, have Congress amend the CWA, as many courts have suggested is the proper course in cases of this kind.[19] Indeed, as this Court has repeatedly made it clear, "no deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language." *Public Employees Retirement Sys. of Ohio v. Betts*, 109 S.Ct. 2854, 2863 (1989).

---

[19] *See, e.g., Friends of Sakonnet v. Dutra*, 739 F. Supp. 623 (D. R.I. 1990) (it is the responsibility of Congress, not the courts, "to correct any defects that may be present in the [Clean Water Act]"); *United States v. Perdue Farms, Inc.*, 680 F.2d 277, 285 (2d Cir. 1982) (literal reading of environmental statute must be followed and "inequitable" results or "alleged drafting error[s] are for Congress, not the courts, to resolve"); *Carlyle Compressor v. Occupational Safety & Health Review Comm'n*, 683 F.2d 673, 675-76 (2d Cir. 1982) ("agency does not have carte blanche . . . to interpret regulations or standards to achieve desired result;. . . proper course . . . would be to amend" regulations).

Thus, it is one thing to assert that Congress intended to "abandon traditional notions of 'waters' (of the United States)" to include certain wetland areas, *Riverside Bayview Homes*, 474 U.S. 121, 133 (1985); it is quite another to conclude that Congress intended to abandon the traditional notion of "water" to include land, whether dry or moist.[20] Accordingly, the lower court seriously erred by rewriting the statutory phrase "into water" to mean "onto wetlands." To paraphrase this Court's observation in *Deal v. United States*, 113 S.Ct. 1993 (1993), "to say that ["into water"] means the same thing as ["onto wetlands"] requires a degree of verbal know-nothingism that would render government by legislation quite impossible." *Id.* at 1998.

CONCLUSION

The petition for a writ of certiorari should be granted. Respectfully submitted.

Daniel J. Popeo
Paul D. Kamenar
(*Counsel of Record*)
Washington Legal Foundation
2009 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 588-0302

Counsel for Petitioners

Date: November 8, 1993

---

[20] *Cf. United States v. Ocie Mills*, 817 F. Supp. 1546. 1554 (N.D. Fla. 1993)("doubtful that the Supreme Court realized that the Corps' definition extends to land that appears to be dry, but which may have some saturated soil vegetation. . . or that it would define the elements of a felony offense").

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1454

UNITED STATES OF AMERICA
v.
JOHN POZSGAI, GIZELLA POZSGAI,
MERCER WRECKING & RECYCLING CORPORATION,
J. VINCH & SONS, INC.,
John Pozsgai and Gizella Pozsgai,
Appellants

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 88-06545)

Argued January 8, 1993

Before: HUTCHINSON and SCIRICA, Circuit Judges
and STANDISH, District Judge*

(Filed June 25, 1993)

OPINION OF THE COURT

SCIRICA, *Circuit Judge*.

In this civil enforcement action, John and Gizella Pozsgai appeal the district court's judgment finding them strictly liable for discharging fill material into wetlands on their property in violation of the Clean Water Act. Defendants also appeal various orders granting the government injunctive relief, finding John Pozsgai in contempt of the injunction, and denying the Pozsgais' motion for relief from judgment. We will affirm.

* The Honorable William L. Standish, United States District Judge for the Western District of Pennsylvania, sitting by designation.

I.

In April 1987, the U.S. Army Corps of Engineers received information that fill material was being dumped into wetlands on a 14-acre site in Morrisville, Pennsylvania. The Corps investigated the site, determined that nearly the entire property constituted wetlands, and found that concrete rubble, earth, and building scraps had been dumped onto one-half to three-quarters of an acre of the wetlands portion of the property. Corps biologist and field investigator Martin Miller described the site as "a forested wetland dominated by arrowwood" and noted "areas of standing water were scattered throughout the site," and "a stream flows along the east border of the property and wetland and is a tributary to the Pennsylvania Canal." Miller also observed several species of vegetation on the site which require a saturated environment to survive, including skunk cabbage, sensitive fern, red maple, sweet gum, ash, and aspen. Soil borings taken by Miller and other Corps biologists confirmed the initial determination of wetlands, revealing water either at or within one inch of the surface of the soil. This so-called hydric soil takes 100 years or more to develop.

Unpermitted discharge of dredged or fill materials into certain wetlands[1] violates a regulation promulgated under the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (1988). Miller's field report stated that "the violation consists of the placement of fill (concrete rubble, earth, and building scraps) in three portions of the wetland for the purpose of raising the elevation for construction of a garage." The report identified the violator as John Pozsgai.

At the time of the Corps investigation, John and Gizella Pozsgai were considering purchasing the property to expand their truck repair business. John Pozsgai planned to build a garage on the property, a project which would require filling a significant amount of the area. In preparation for this purchase, Pozsgai hired the engineering firm of J.G. Park Associates to examine the suitability of the property for building. On December 12, 1986, J.G. Park President Nicholas Moran advised Pozsgai by letter of the results of its site investigation of the property. The letter stated:

---

[1] The regulations only cover wetlands adjacent to tributaries of waters used in interstate commerce and nonadjacent wetlands which may affect interstate commerce. 33 C.F.R. § 328.3(a)(3), (7) (1992).

> Based upon this investigation, it is my professional opinion that the entire site meets the criteria set forth by the Army Corps of Engineers as "wetlands." This is based upon soils, hydrology and vegetation.
>
> Please be advised that any further development that might be considered on this site would have to be approved and reviewed by the Army Corps of Engineers, and it has been our experience in the past that the Corps is most reluctant to issue permits for sites that have conditions such as this.

This advice turned out to be accurate. Corps biologist Miller spoke to Pozsgai by telephone and advised him not to place fill in the wetlands until he had obtained a permit. Pozsgai told Miller a previous prospective buyer was responsible for at least some of the filling but that Pozsgai planned to fill enough area to build a garage. Pozsgai also agreed to stop his filling activities until he had complied with the permit requirements and said his engineer would call Miller to discuss these requirements.

Pozsgai continued his efforts to purchase the property. Apparently dissatisfied with J.G. Park's opinion, Pozsgai hired a second engineer, Ezra Golub, to evaluate the property. Golub, too, advised Pozsgai the property was wetlands and the Corps would have to approve any building. Seeking yet a third opinion, Pozsgai hired Majors Engineers, who concurred in the views expressed by the previous two engineers.

After receiving the engineers' reports, Pozsgai renegotiated the sale contract for the property. The original sale contract, for a purchase price of $ 175,000, made the sale contingent on Pozsgai obtaining building permits for his proposed garage. The revised contract replaced the contingency provision with an "as is" clause and included a $ 32,000 reduction in the purchase price, from $ 175,000 to $ 143,000. Under this revised sale contract, Pozsgai purchased the property on June 19, 1987.

In the meantime, Corps investigator Miller continued to monitor activities at the property. Following his April 1987 visit, Miller had several telephone conversations with Pozsgai. Each time, Miller told Pozsgai to stop his filling activities and explained the permit requirements. Additionally, the Corps issued a cease and desist letter to the Cassalias, the prior owners of the property. The Cassalias responded by letter, stating they had sold the property to Pozsgai but had never given him permission to place fill on the property. Miller returned to the

site in August 1987 and observed that fill had been placed on an additional two acres of the property. He reiterated to Pozsgai that he would need a permit to discharge the fill and indicated the Corps would issue a cease and desist order if Pozsgai did not stop filling the wetlands. Pozsgai told Miller that township officials and the police had visited him and shown him the cease and desist letter sent to the Cassalias. He also told Miller he had stopped work on the property.

On September 3, 1987, the Corps sent John and Gizella Pozsgai a cease and desist letter. The letter stated fill was being placed on the Pozsgais' property in federally regulated wetlands without a permit in violation of the Clean Water Act and directed the Pozsgais to stop "conducting, contracting, or permitting any further work of this nature." In response, the Pozsgais' counsel wrote the Corps on September 24, reporting that John Pozsgai had conferred with engineers regarding the cease and desist letter and expressing Pozsgai's opinion that the site did not "naturally" contain wetlands but had only become saturated as a result of construction of an overpass near the property.

Miller visited the site again on October 6 and observed additional fill. On this visit, Miller determined almost the entire property constituted wetlands. He ordered Pozsgai not to do any more filling on the property. Pozsgai said he believed the area was not wetlands because he had excavated the stream on the property. Miller returned to the site in November, again observing new fill since his last visit. Miller reiterated the need for Pozsgai to obtain a permit. On December 17, the Corps sent the Pozsgais a second cease and desist letter, directing them to stop filling, and offering them two options to resolve the violation -- removing all fill material and restoring the site to its former condition, or obtaining a Water Quality Certification from the Pennsylvania Department of Environmental Resources.

In May 1988, the Corps again discovered that John Pozsgai was continuing to fill the wetlands. Subsequent investigation revealed Pozsgai had received several hundred truckloads of fill from at least five different hauling companies. On August 18, 1988, following a complaint from a neighbor about the dumping, the U.S. Environmental Protection Agency installed a video camera in the neighbor's house. The video camera recorded dumping on the property.

On August 24, 1988, the United States filed a civil complaint in federal district court, alleging that John and Gizella Pozsgai, and two of the hauling companies hired by the Pozsgais, had

violated the Clean Water Act by filling the wetlands on the Pozsgais' property without a permit. [2] The government sought an order to restore the property to its original state, as well as civil penalties. It simultaneously moved for a temporary restraining order and a preliminary injunction to stop further discharge. The district court entered the TRO. Two days later, on August 26, the video camera recorded 25 truckloads of dirt dumped on the site, and a man, identified by witnesses as John Pozsgai, operating a bulldozer leveling the fill.

On September 2, the government obtained an Order to Show Cause why Pozsgai should not be held in contempt for violating the TRO. The district court held a hearing on the contempt proceeding and the preliminary injunction on September 9 and September 16. After the hearing, the court granted the preliminary injunction and held Pozsgai in contempt, ordering him to pay $ 5,000 within 48 hours.

In the meantime, the government initiated a parallel federal criminal proceeding against John Pozsgai. On December 30, 1988, a jury convicted Pozsgai of 40 counts of unpermitted discharge. The district judge sentenced him to three years for the pre-Sentencing Guideline counts and twenty-seven months for post-Guideline counts, to run concurrently, placed him on 5 years probation, and fined him $ 200,000. We affirmed the conviction. *United States v. Pozsgai*, 897 F.2d 524 (3d Cir.), *cert. denied*, 498 U.S. 812, 111 S. Ct. 48, 112 L. Ed. 2d 24 (1990).[3]

On January 8, 1990, the district court granted a permanent injunction in the government's civil action. The court found the property contained wetlands subject to the Corps' jurisdiction and held the Pozsgais and the haulers strictly liable for the unpermitted discharge. It further ordered defendants to implement the plan developed by the Corps to restore the property. The Pozsgais filed a motion to reconsider which the district court denied.

On June 18, the court implemented its restoration order and directed the defendant haulers to restore the property by removing fill from the wetland areas and depositing it in other

---

[2] The district court had jurisdiction under the civil enforcement provision of the Clean Water Act, 33 U.S.C. § 1319(b) (1988).

[3] No criminal action was brought against Gizella Pozsgai.

non-wetland areas of the property. [4] The Pozsgais filed a Fed. R. Civ. P. 60(b) motion for relief from this order, objecting to the locations where the haulers placed the fill and requesting the court to order the haulers to remove the fill from the Pozsgais' property altogether. The court denied the motion, ruling that the Pozsgais had no "veto power" over the restoration process and that it would be inequitable to require the haulers to move the fill a second time when the Pozsgais had improperly disposed of it in the first place. The court entered final judgment on April 1, 1992. The Pozsgais appealed. [5]

II.

In furtherance of its purpose to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), the Clean Water Act prohibits the discharge of pollutants into navigable waters without a permit. 33 U.S.C. § 1311; *United States v. Riverside Bayview Homes*, 474 U.S. 121, 123 (1985). The Act defines the operative terms of this prohibition broadly. The term "pollutants" includes fill material such as "dredged spoil, . . . rock, sand, [and] cellar dirt," 33 U.S.C. § 1362(6), and "navigable waters" means "the waters of the United States," *id.* § 1362(7). In so defining the term "navigable waters," Congress expressed a clear intent "to repudiate limits that had been placed on federal regulations by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Riverside Bayview Homes*, 474 U.S. at 133 (citing S. Conf. Rep. No. 92-1236, p. 144 (1972); 118 Cong. Rec. 33756-57 (1972) (statement of Rep. Dingell)).

---

[4] The haulers, having completed their work, are not parties to this appeal.

[5] We have jurisdiction under 28 U.S.C. § 1291 (1988). We exercise plenary review over the district court's interpretation of the Clean Water Act and its regulations, which are questions of federal law. *United States v. Gordon*, 961 F.2d 426, 429 (3d Cir. 1992). We review the court's factual findings under a clearly erroneous standard. Fed. R. Civ. P. 52(a); *Sheet Metal Workers Int'l Ass'n Local 19 v. 2300 Group, Inc.*, 949 F.2d 1274, 1278 (3d Cir. 1991). We review the court's grant of injunctive relief, its contempt order, and its' denial of the Pozsgais' motion for relief from the judgment for abuse of discretion. *Delaware Valley Citizens' Council v. Pennsylvania*, 755 F.2d 38, 41 (3d Cir.), *cert. denied*, 474 U.S. 819 (1985).

The Corps of Engineers has by regulation interpreted the term "waters of the United States" to include "wetlands," defined as "areas that are inundated or saturated by surface or ground water at a frequency or duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions, [and] generally includes swamps, marshes, bogs, and similar areas." 33 C.F.R. § 328.3(b) (1992). The regulation extends the Corps' authority to wetlands "adjacent" to tributaries of waters presently or formerly used, or susceptible to use, in interstate commerce. *Id.* The Supreme Court has upheld this regulation as a reasonable interpretation of the Clean Water Act. Riverside Bayview Homes, 474 U.S. at 135.

Section 404 of the Act authorizes the Corps of Engineers to issue permits for "the discharge of dredged or fill material into the navigable waters. . . ." 33 U.S.C. § 1344(a). The permit program is the central enforcement tool of the Clean Water Act. The program reflects the Act's strategic shift in water pollution policy, which previously had employed only water quality standards. These standards proved unsuccessful in controlling pollution because the Corps had difficulty linking the quality of the water to discharges from a particular source. The Act sought to avoid this problem by focusing pollution control efforts at the point of discharge. See *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 204 (1976). The Environmental Protection Agency implemented that strategy in part by establishing national effluent standards. The permit system translates these standards into site-specific limitations to accommodate individual circumstances and ease enforcement. *Id.* at 205. Unpermitted discharge is the archetypal Clean Water Act violation, and subjects the discharger to strict liability. 33 U.S.C. § 1311(a) ("except as in compliance with [a permit], the discharge of any pollutant by any person shall be unlawful").

III.

On appeal, the Pozsgais do not dispute they discharged fill onto wetlands without a permit. They urge instead that this conduct did not violate the Clean Water Act. The Pozsgais contend that filling wetlands does not constitute discharge of pollutants "into water" within the meaning of the Clean Water Act, that their wetlands fall outside the Corps' regulation and permit requirements, and that the regulation as applied to them violates the Commerce Clause.

A.

We first address the Pozsgais' argument that they did not discharge pollutants "into water" within the meaning of the Clean Water Act. 33 U.S.C. § 1362(6). They contend that the fill materials deposited on their property were not "pollutants," and that they discharged only into "wetlands," which are not equivalent to "water."

To assess these contentions, we look to the statute. The operative section of the Clean Water Act is § 301, which provides that absent a permit, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). The Act defines "pollutant" to mean "dredged spoil, rock, sand" and other materials "discharged into water," *id.* § 1362(6), and defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source," *id.* § 1362(12). The Act defines "navigable waters" to mean "the waters of the United States." *Id.* § 1362(7). The Corps' regulation upheld in *Riverside Bayview* defines "waters of the United States" to include certain wetlands.

(1)

In ruling the Pozsgais' fill material constituted "pollutants," the district court cited evidence that they placed "concrete rubble" and "cinder block" on their property and cleared and redeposited vegetation there. The court held each of these qualified as "pollutants," defined to include "dredged spoil, solid waste, . . . rock, sand, . . . municipal, and agricultural waste . . . ." 33 U.S.C. § 1362(6). On appeal, the Pozsgais stress the absence of the words "fill material" in the definition of "pollutant." They point to Congress' use of the term "fill material" in the Act's permitting provision, *id.* § 1344, as evidence Congress was aware of this phrase and chose not to include it in the definition of "pollutant." This argument is unconvincing. Because the term "pollutant" includes "dredged spoil, rock, [and] sand," *id.* § 1362(6), which are the constituents of the fill material used here, the materials discharged by the Pozsgais constituted "pollutants."

(2)

The Pozsgais' second contention is more sweeping. They argue that the phrase "into water" in the definition of "pollutant" forecloses application of the Clean Water Act to their activities, which consisted only of depositing fill material into "wetlands." Again, the district court disagreed, citing the Corps regulation

that defines "waters of the United States" to include "wetlands" adjacent to waters used in interstate commerce, 33 C.F.R. § 328.3(a)(7), and to the Supreme Court's *Riverside Bayview Homes* decision upholding this regulation as a reasonable interpretation of the Act, 474 U.S. at 135.

The Pozsgais contend the district court misconstrued the Act. In their view, the phrase "into water" in the definition of "pollutant" is the critical limiting feature of the Act because this phrase determines application of the Act's permit requirement. They base this argument on the Act's liability section, which provides that without a permit, "the discharge of any *pollutant* by any person shall be unlawful." 33 U.S.C. § 1311 (a). By contrast, they contend, the phrase "waters of the United States" -- and the Corps' regulation interpreting that phrase to include adjacent wetlands -- only define the Act's geographic jurisdiction and cannot alone support a finding of liability. Thus, the Pozsgais maintain, the district court's reliance on these provisions, and on *Riverside Bayview's* interpretation of them, was misplaced. They conclude that because neither *Riverside Bayview* nor the Corps regulation address the definition of "pollutant," these authorities do not obviate the statutory obstacle to liability created by the requirement that materials only constitute "pollutants" if they are discharged "into water."

The interpretive problem raised by the Pozsgais' argument lies in knitting together the various statutory provisions. Incorporating the definition of "pollutant" in § 1362(6) into the definition of "discharge of a pollutant" in § 1362(12) creates an apparent redundancy, as the term "discharge of a pollutant" then reads: "any addition of any 'dredged spoil . . . discharged into water' to navigable waters from any point source." The question then becomes how the phrase "into water" and the phrase "to navigable waters" co-exist in this definition. The Pozsgais avoid this problem by ignoring the definition of "discharge of a pollutant," and focusing instead exclusively on the definition of "pollutant" and the use of the word "pollutant" in the Act's liability section, § 1311. This reading is untenable because although § 1311 contains the word "pollutant," it does so in the context of expressly prohibiting "discharge of any pollutant." We read this as a clear cross-reference to the definition of "discharge of a pollutant" in § 1362(12).

At oral argument, the Pozsgais argued §§ 1362(6) and (12) are not in conflict. They asserted that because the term "discharge of a pollutant" itself includes the term "pollutant," the former definition, including its use of "navigable waters," is

necessarily limited by the phrase "into water" in the definition of "pollutant." The more natural reading of the definition of "discharge of a pollutant" is that the phrase "navigable waters" modifies the phrase "into water," and accordingly, that the critical definition is that given the term "navigable waters." As a textual matter, the word "navigable" is an adjective modifying the word "water." Moreover, the statute contains numerous references to the phrase "navigable waters," revealing that this phrase, rather than "into water," is the focus of the Act's coverage. The Act's "Congressional declaration of goals and policy" states: "it is the national goal that the discharge of pollutants into the *navigable waters* be eliminated by 1985." 33 U.S.C. § 1251(a)(1). Section 404 provides that "the Secretary [of the Army] may issue permits . . . for the discharge of dredged or fill material into the *navigable waters* at specified disposal sites." *Id.* § 1344(a). Additionally, the Act defines "navigable waters" to mean "waters of the United States." *Id.* § 1362(7).[6]

The legislative history also demonstrates the significance and breadth of the term "navigable waters." The Conference Report states: "the conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation . . . ." S. Rep. No. 1236, 92d Cong., 2d Sess. 144, *reprinted* in 1 A *Legislative History of the Water Pollution Control Act Amendments of 1972* 327 (1973); *see also* H.R. Rep. No. 911, 92d Cong., 2d Sess. 131 (containing identical language), in 1 *Legislative History* 818.

Moreover, the Senate Report makes clear it is the discharge of materials constituting "pollutants" into "navigable waters" that triggers the Act's permit requirement. The Report provides:

---

[6] The Pozsgais further contend that subsection (12) seeks to limit subsection (6) by adding the requirement that the discharge be from a "point source." Assuming this is correct, it does not help them. The Act defines "point source" to include "any discernible, confined and discrete conveyance, including but not limited to any . . . container, rolling stock, concentrated animal feeding operation, or vessel . . . from which pollutants are or may be discharged. . . ." Id. § 1362(14). Courts have consistently held that dump trucks and bulldozers, such as those used for depositing and spreading fill on the Pozsgais' property, qualify as "point sources." *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983); *Matter of Alameda County Assessor's Parcel*, 672 F. Supp. 1278, 1284-85 (N.D. Cal. 1987); *United States v. Tull*, 615 F. Supp. 610, 622 (E.D. Va. 1983), *aff'd*, 769 F.2d 182 (4th Cir. 1985), *rev'd on other grounds*, 481 U.S. 412 (1987); *United States v. Weisman*, 489 F. Supp. 1331, 1337 (M.D. Fla. 1980).

> For the first time the Committee would add to the law a definition of the term pollutant. In order to trigger the control requirements over addition of materials to the navigable water, waters of the contiguous zone and the ocean, it is necessary to define such materials so that litigable issues are avoided over the question of whether the addition of a particular material is subject to the control requirements . . . . The control strategy of the Act extends to navigable waters. . . .

S. Rep. No. 414, 92d Cong., 1st Sess. 77-78, in 2 *Legislative History* 1494-95. This legislative history supports our view that the phrase "navigable waters" rather than "into water" is the critical statutory language. It also demonstrates the definition of "pollutant" establishes the types of materials whose discharge violates the Act rather than the locus of their discharge, further undermining the significance of the "into water" phrase.

Our emphasis on "navigable waters" also comports with the interpretation of the Clean Water Act by other courts, who have reached the same conclusion without expressly considering the "into water" portion of the definition of "pollutant." In upholding the Corps' wetlands regulation in *Riverside Bayview*, the Supreme Court stated simply: "the act prohibits discharges into 'navigable waters,' see Clean Water Act §§ 301(a), 404(a), 502(12), 33 U.S.C. §§ 1311(a), 1344(a), 1362(12)." 474 U.S. at 133. We find significant both the Court's summary treatment of this question and its citation only to the "discharge of a pollutant" definition, § 1362(12), not to the "pollutant" definition, § 1362(6).[7]

The Pozsgais maintain the phrase "navigable waters," which they note is defined as "waters of the United States," refers only

---

[7] Other courts considering wetlands filling cases have similarly interpreted the Act to prohibit discharge of pollutants into navigable waters, thus ignoring the "into water" component of the "pollutant" definition. *See Town of Norfolk v. U.S. Army Corps of Engineers*, 968 F.2d 1438, 1445 (1st Cir. 1992); *Avoyelles Sportsmen's League*, 715 F.2d at 922; *United States v. Tull*, 769 F.2d at 183; *United States v. Larkins*, 657 F. Supp. 76, 78 n.2 (W.D. Ky. 1987); *United States v. Lambert*, 589 F. Supp. 366, 371 (M.D. Fla. 1984), *aff'd*, 852 F.2d 189 (6th Cir. 1988), *cert. denied*, 489 U.S. 1016 (1989); *United States v. Bradshaw*, 541 F. Supp. 880, 883 (D. Md. 1981) (all ruling that discharge of fill material into wetlands violates the Clean Water Act).

to the geographic jurisdiction of the Act. Therefore, they contend, that definition does not modify the phrase "into water," which they read only to describe the conduct regulated by the Act. This distinction is illusory. The purpose of extending the Corps' geographic jurisdiction to "waters of the United States," including adjacent wetlands, is precisely so the Corps can control conduct occurring on these wetlands, i.e., the discharge of pollutants. Indeed, such conduct has given rise to this action.

For the reasons we have outlined, we believe Congress intended "navigable waters" to be the controlling phrase in defining the scope of the Clean Water Act, and we believe this phrase modifies the more general term "into water" appearing in the definition of "pollutant." Accordingly, the Pozsgais' wetlands filling activities constituted "discharge into water" and fall within the statute. Our conclusion that the Act's permit requirement applies to pollutants discharged into "navigable waters" does not, however, dispose of the Pozsgais' second statutory argument -- that the Corps' wetlands regulation represents an impermissible construction of the unambiguous statutory term "water."

B.

In asserting the term "water" as used in the Clean Water Act is unambiguous, the Pozsgais seek to bring this case within the exception to the rule of deference to an agency's statutory interpretation established by *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). Under *Chevron*, courts should not defer to an agency regulation where legislative language is unambiguous because Congress has chosen to define precisely the statutory meaning and has left no implicit or explicit gap in statutory coverage for the agency to fill. 467 U.S. at 843-44. Where, on the other hand, a statute is "silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's [regulation addressing the issue] is based on a permissible construction of the statute." *Id.* at 843. Thus, *Chevron* commands a two-step approach. The court first determines whether the statute is clear, and if it is unclear, the court decides whether the agency's construction is reasonable. *N.L.R.B. v. New Jersey Bell Telephone Co.*, 936 F.2d 144, 147 (3d Cir. 1991).

Applying *Chevron* in *Riverside Bayview*, the Supreme Court squarely rejected the contention that "water" cannot mean "wetlands." Like the Pozsgais, the defendant in *Riverside*

Bayview sought to place fill materials on its property without a Clean Water Act permit in preparation for a construction project, and the Corps of Engineers obtained an injunction against the filling. The defendant contended the Corps' regulation extending the permit requirement to adjacent wetlands exceeded the bounds of the Clean Water Act. Rejecting this contention, the Court determined not only that the phrase "water" lacked a fixed meaning, 474 U.S. at 132, but also that the Corps "acted reasonably in interpreting the Act to require permits for the discharge of fill material into wetlands adjacent to the 'waters of the United States,'" *id.* at 139.

In urging Congress' use of the term "water" forecloses application of the Act to their activities, the Pozsgais insist the word "water" means "the liquid state of H20," not "wetlands" or "moist soil" or "dry land that the Corps determines to be water." In *Riverside Bayview*, the Supreme Court took a different view, stating:

> On a purely linguistic level, it may appear unreasonable to classify "lands," wet or otherwise, as "waters." Such a simplistic response, however, does justice neither to the problem faced by the Corps in defining the scope of its authority under § 404(a) nor to the realities of the problem of water pollution that the Clean Water Act was intended to combat. In determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs -- in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of "waters" is far from obvious.

474 U.S. at 132.

Having determined the term "water" was ambiguous, the Court then moved to Chevron's second step and considered whether the Corps' interpretation of the term to include adjacent wetlands was reasonable. The Court noted that, in determining "the landward limit of Federal jurisdiction under Section 404 [of the Clean Water Act] must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States," the Corps concluded that "water

moves in hydrologic cycles, and the pollution of [adjacent wetlands] . . . will affect the water quality of the other waters within that aquatic system." *Riverside Bayview*, 474 U.S. at 121 (quoting 42 Fed. Reg. 37128 (1977)). Upholding this interpretation, the Court recognized "the evident breadth of congressional concern for protection of water quality and aquatic ecosystems" embodied in the Act, 474 U.S. at 133, and determined: "we cannot say that the Corps' conclusion that adjacent wetlands are inseparably bound up with the 'waters' of the United States -- based as it is on the Corps' and EPA's technical expertise -- is unreasonable," *id.* at 134.

The Pozsgais attempt to distinguish *Riverside Bayview* on the ground that the Court based its ruling on the "navigable waters" definition rather than the "into water" phrase. But as we have shown, "navigable waters" is the operative phrase. Moreover, as the quoted passage indicates, the Supreme Court's analysis dealt with a question common to both statutory phrases -- whether the Corps reasonably interpreted the term "water" to include adjacent wetlands.

The rationales underlying *Chevron* apply with particular force to the Corps' application of the Clean Water Act to wetlands. In *Chevron*, the Court defended deference to agency interpretations on the grounds that unlike a court, an agency has specialized knowledge of the relevant statutory area and is a politically accountable body. 467 U.S. at 865 ("judges are not experts in the field, and are not part of either political branch of the Government"); see Cass R. Sunstein, *Law and Administration after Chevron*, 90 Colum. L. Rev. 2071, 2086-87 (1990).

The *Chevron* Court indicated these rationales are particularly powerful where "the regulatory scheme is technical and complex." 467 U.S. at 865. Like the Clean Air Act in *Chevron*, the Clean Water Act addresses a scientifically complicated subject, and has an intricate regulatory structure. Thus, the Supreme Court recognized in *Riverside Bayview*:

> In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.

474 U.S. at 134; *see also Arkansas v. Oklahoma*, 112 S. Ct. 1046, 1061 (1992) (reversing Court of Appeals decision to

invalidate Clean Water Act permit issued by EPA because that court failed to defer to EPA's interpretation of its water quality regulation and therefore "made a policy choice that it was not authorized to make"); *Chemical Manufacturers Ass'n v. Natural Resources Defense Council*, 470 U.S. 116, 125, 84 L. Ed. 2d 90, 105 S. Ct. 1102 (1985) (deferring to EPA interpretation of Clean Water Act because "EPA's understanding of this very 'complex statute' is a sufficiently rational one to preclude a court from substituting its judgment for that of EPA," and citing *Chevron*).

The *Chevron* Court's concern that agencies have political accountability, which courts lack, also supports deference to the Corps' wetlands regulation. In articulating this rationale, the Court reasoned:

> [t]he arguments over policy that are advanced in the parties' briefs create the impression that respondents are now waging in a judicial forum a specific policy battle which they ultimately lost in the agency and in the 32 jurisdictions opting for the "bubble concept," but one which was never waged in the Congress. Such policy arguments are more properly addressed to legislators or administrators, not to judges. . . . In such a case, federal judges -- who have no constituency -- have a duty to respect legitimate policy choices made by those who do.

467 U.S. at 864-66.

The regulation the Pozsgais challenge here represents the product of a nearly twenty-year policy battle over the scope of federal wetlands protection. The Corps initially interpreted the term "navigable waters" to apply only to those waters "subject to the ebb and flow of the tide," the regulatory definition used by the Corps under the River and Harbor Act of 1899. The Environmental Protection Agency, which shared administrative authority under the Clean Water Act with the Corps, believed the Act should be construed to cover wetlands because of their significance to water pollution control. This fight culminated in a 1975 court decision ordering the Corps to revise and broaden its regulation. *Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975). Following this decision, the Corps revised its regulation, a process which lasted two years, engendered more than 4,500 comments, and resulted in a final rule defining the term "navigable waters" to include wetlands. 42 Fed. Reg. 37122 (1977).

Nonetheless, during the debate on the Clean Water Act of 1977, "because of the pressure of many farm, forestry and land development groups, there were continued efforts to amend the Act to redefine the term "navigable waters" in a more traditional and restrictive sense . . . . None passed." *Avoyelles Sportsmen's League, Inc. v. Alexander*, 511 F. Supp. 278, 288 (W.D. La. 1981), *aff'd*, 715 F.2d 897 (5th Cir. 1983). Thus, the *Avoyelles* court concluded, "wetlands is a jurisdictional term, the product of the legislative process, of political pressure groups." 511 F. Supp. at 288; *see also Riverside Bayview*, 474 U.S. at 138 (citing Congress' refusal to limit the definition of "navigable waters" in the 1977 Act as "additional support for a conclusion that Congress in 1977 acquiesced in the Corps' definition of waters as including adjacent wetlands").

The Pozsgais acknowledge the Corps' wetlands jurisdiction continues to be the subject of heated political debate. They note "numerous Congressional hearings have been held," and 52 bills introduced in Congress, to address the regulation of wetlands. Indeed, the dispute over the scope of federal wetlands regulation has been at least as dominant a feature of the political landscape as the debate over the "bubble concept" at issue in *Chevron*. And like the plaintiffs opposed to EPA's "bubble" regulation in *Chevron*, the Pozsgais seek here to "wage in a judicial forum a specific policy battle which [was] ultimately lost in the agency." 467 U.S. at 864. But as the Supreme Court stated last term, "it is not our role . . . to decide which policy choice is the better one, for it is clear that Congress has entrusted such decisions" to the Corps of Engineers. *Arkansas v. Oklahoma*, 112 S. Ct. at 1061. Therefore, we hold that the Clean Water Act's use of the word "water," both as part of the "into water" phrase in the definition of "pollutant" and in the phrase "navigable waters," pose no statutory obstacle to the Corps regulation under which the district court found the Pozsgais liable.

IV.

The Pozsgais also contend the wetlands on their property fell outside the scope of the Corps regulation prohibiting unpermitted discharge on adjacent wetlands. In disputing application of the regulation to their activities, the Pozsgais make two arguments, one based on the evidence, the other based on the terms of the regulation. In the evidentiary argument, the Pozsgais maintain the government failed to prove their wetlands are "adjacent" within the meaning of the regulation.

A.

The regulation grants the Corps jurisdiction over "waters of the United States," defined in 33 C.F.R. § 328.3(a) to include: "all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce," § 328.3(a)(1); "tributaries of [these] waters," § 328.3(a)(5); and "wetlands adjacent to [these] waters [or their tributaries]," § 328.3(a)(7). Applying this regulation, the district court found the Pozsgais discharged into wetlands (§ (a)(7)), which were "adjacent" to a stream on the Pozsgais' property which was a "tributary of the Pennsylvania Canal" (§ (a)(5)). The Canal, in turn, flowed into the Delaware River, which, the court ruled, satisfied the requirement that the Pennsylvania Canal is, was, or could be used in interstate commerce (§ (a)(1)). We review these factual findings under the clearly erroneous standard. *Sheet Metal Workers Int'l Assn. Local 19 v. 2300 Group, Inc.*, 949 F.2d at 1278.

The Pozsgais dispute the stream is a tributary of the Pennsylvania Canal. In making this finding, the district court relied on aerial photographs and testimony from Corps biologist Miller. The government has since conceded the photographs are inaccurate. But the government also introduced other evidence which the Pozsgais have not contested. The eyewitness accounts of two Corps biologists, Martin Miller and Michael Claffey, recorded in Miller's report of his investigation of the property in April 1987, and in Claffey's affidavit, confirm the stream is a tributary of the Pennsylvania Canal. Given this uncontradicted evidence, we believe the district court's finding was not clearly erroneous.

The Pozsgais also dispute that the Pennsylvania Canal is, was, or could be used in interstate commerce. The district court reached this conclusion by noting the Canal flowed into the Delaware River, which it believed was enough to satisfy the broad reach of the Clean Water Act. The Pozsgais argue that this fact, without more, does not establish the Canal itself was, is, or could be used in interstate commerce. Even if true, this argument is unavailing, because the government has pointed to other evidence supporting the conclusion the Canal in the past was used in interstate commerce, which satisfies the terms of § 328.3(a)(1).

The government requests that we take judicial notice of the Canal's historic significance as an interstate commerce route. It cites Robert McCullough & Walter Leuba, *The Pennsylvania Main Line Canal* (1960), and C.P. Yoder, *Delaware Canal*

Journal (1972), two history books which discuss the Canal's nearly 100-year history as a shipping route for coal and other commodities.

Under Fed. R. Evid. 201, we may take judicial notice of any fact "not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." Fed. R. Evid. 201(a). Furthermore, because "judicial notice may be taken at any stage of the proceeding," Fed. R. Evid. 201(f), we may take judicial notice of a fact although the district court did not.

The Pozsgais dispute neither that an appellate court may take judicial notice nor that the history books cited by the government are suitable sources for judicial notice. Instead, they contend only that the books do not prove that the Pennsylvania Canal was ever used in interstate commerce. We disagree.

A cursory review of *The Pennsylvania Main Line Canal* and *Delaware Canal Journal* reveals the Canal's important role as a shipping route carrying coal in interstate commerce. In the middle of the century, the Canal consistently carried more than half a million tons of coal per year, reaching its peak volume with 792,000 tons of coal in 1866. Many of the coal barges served the Philadelphia market. Others continued on to New York City, after being towed by steam boats across the Delaware River to Bordentown, New Jersey, where they reached the Delaware and Raritan Canal. In 1939, the Delaware Division Canal Company donated the entire canal property to the Commonwealth of Pennsylvania, which established Roosevelt State Park. In recognition of its vital role in "providing a convenient and economic means of transporting coal to Philadelphia, New York and the eastern seaboard," the Canal was designated a National Historic Landmark in 1976. United States Army Corps of Engineers, *Preliminary Case Report for Neshaminy Water Resources Authority, Point Pleasant Diversion Project, Point Pleasant, Bucks County, Pennsylvania* § 2.1 at 7 (1982).

This is at least as much evidence of an effect on interstate commerce as that found to satisfy this jurisdictional requirement in prior similar cases. *See Quivira Mining Co. v. United States E.P.A.*, 765 F.2d 126, 130 (10th Cir. 1985) (non-navigable creeks and "arroyos" affect interstate commerce because during times of "intense rainfall" there could be a surface connection between these waterways and navigable streams), *cert. denied*, 474 U.S. 1055 (1986); *United States v. Ashland Oil and Transportation Co.*, 504 F.2d 1317, 1329 (6th Cir. 1974) (Act

constitutionally applies to discharge of oil into non-navigable tributary three waterways removed from navigable river). In so holding, these courts recognized Congress' intent to give the term "navigable waters" the "broadest possible constitutional interpretation." *Ashland Oil*, 504 F.2d at 1317 (citing 118 Cong. Rec. 33756-57 (1972) (statement of Representative Dingell)); *Quivara Mining*, 765 F.2d at 129. The Pozsgais maintain these cases are distinguishable as both involved discharge into waterways rather than wetlands. But this is a distinction without a difference in light of the Corps' regulation, which equates adjacent wetlands with waterways.

B.

The Pozsgais also contend the regulation does not apply because the government failed to establish their discharge affected interstate commerce. The regulations require proof of an effect on interstate commerce, they argue, because their wetlands are "essentially isolated." In coining the term "essentially isolated," the Pozsgais seek to take this case outside *Riverside Bayview*, where the Supreme Court expressly reserved the question whether the Act authorized the Corps to regulate wetlands not "adjacent to open bodies of water." *Id.* at 131 n.8. They also use the term "essentially isolated" in an effort to bring their wetlands within the section of the regulation governing "isolated" wetlands. That section conditions application of the permit requirement to "isolated" wetlands on a showing of a site-specific impact on interstate commerce. 33 C.F.R. § 328.3(a)(3).

The Pozsgais assert their wetlands are "essentially isolated" because they are "above the headwaters," the term "headwaters" being defined as "the point on a non-tidal stream above which the average annual flow is less than five cubic feet per second." 33 C.F.R. § 330.2(b). They note the regulation contains Nationwide Permit 26, which exempts the "discharge of dredged or fill materials" into wetlands above the headwaters from the individual permit requirement provided the discharger meets certain conditions. 33 C.F.R. § 330.5(a)(26). Establishment of this nationwide permit, the Pozsgais claim, reflects the Corps' policy judgment that these "essentially isolated" wetlands are the functional equivalent of isolated wetlands. Therefore, they conclude, an individualized showing of an interstate commerce

effect is required to subject their "essentially isolated" wetlands to the Clean Water Act. [8]

The Corps' decision to establish a nationwide permit for discharge of fill material into wetlands above the headwaters apparently reflects the agency's expert judgment that these wetlands pose less of a water pollution concern than do certain other wetlands. See 33 C.F.R. § 320.1(a)(3) (justifying the nationwide permit program as "the primary method of eliminating unnecessary federal control over activities which do not justify individual control or which are adequately regulated by another agency"). But Nationwide Permit 26 hardly suggests wetlands above the headwaters are environmentally insignificant, as it conditions discharge on a water quality certification from the state in which the wetlands are located, 33 U.S.C. § 1341(a)(1) and 33 C.F.R. §§ 330.5(b)(11), 330.9(b)(3), and requires written notification to the Corps prior to discharge, 33 C.F.R. §§ 330.5(a)(26), 330.7(b).

Moreover, the Pozsgais' contention that discharge into wetlands above the headwaters may only be regulated upon the showing of a specific effect on interstate commerce is foreclosed by § 328.3, in which the Corps distinguished for interstate commerce purposes between adjacent and isolated wetlands, and did not treat separately wetlands above the headwaters. Where, as here, the Pozsgais' wetlands are both above the headwaters and adjacent, only the latter characteristic matters for interstate commerce purposes. An explanatory statement issued by the Corps upon promulgation of the final regulation supports this conclusion: "we emphasize that the "headwaters" concept used in this new regulation . . . . is not to be construed as the point beyond which a stream ceases to be a water of the United States. . . . ." 47 Fed. Reg. 37129 (1977).

---

[8] The Pozsgais also rely on Nationwide Permit 26 as a separate defense to their unpermitted discharge, arguing the nationwide permit obviated the need for an individual permit. As did the district court, we reject this argument because the Pozsgais did not comply with the required procedures for the use of Nationwide Permit 26. Specifically, they failed to obtain a water quality certification from the State of Pennsylvania, as required by 33 U.S.C. § 1341(a)(1) and 33 C.F.R. §§ 330.5(b)(11), 330.9(b)(3), and failed to provide the Corps with pre-discharge notification for the use of Nationwide Permit 26 mandated by 33 C.F.R. §§ 330.5(a)(26), 330.7(b). The Pozsgais' failure to comply with the procedural requirements of Nationwide Permit 26 does not, however, foreclose them from arguing that regulation of their wetlands is permissible only upon the showing of an effect on interstate commerce.

The Pozsgais' claim that their wetlands are "essentially isolated" thus reduces to an attack on the "adjacency" regulation upheld in *Riverside Bayview*. But the use of the adjective "essentially" cannot convert the Pozsgais' "adjacent" wetland to an "isolated" wetland. This transparent effort to rewrite the regulation, like the Pozsgais' argument that the term "water" cannot mean "wetlands," is a policy question properly put to Congress or the Corps. *See Riverside Bayview*, 474 U.S. at 134 ("we cannot say that the Corps' conclusion that adjacent wetlands are inseparably bound up with the "waters" of the United States -- based as it is on the Corps' and the EPA's technical expertise -- is unreasonable"); *Chevron*, 467 U.S. at 866.

Accordingly, because the wetlands here qualify as "adjacent" within the meaning of the regulation, the government was not required to prove that "the use, degradation or destruction of [the Pozsgais' wetlands] could affect interstate commerce," 33 C.F.R. § 328.3(a)(3), in order to subject the Pozsgais to liability under the Clean Water Act. [9] Under the regulation, the requisite interstate commerce nexus was established because the wetlands were adjacent to a tributary of a waterway formerly used in interstate commerce. 33 C.F.R. § 328.3(a)(1), (7).

V.

We now consider the Pozsgais' argument that the Corps' adjacent wetlands regulation as applied to them violates the Commerce Clause because the regulation does not require proof of a specific effect on interstate commerce from the Pozsgais' filling, and because wetlands above the headwaters, as a class of wetlands, do not significantly affect interstate commerce. We review challenges to Congress' exercise of its Commerce Clause power under a deferential standard. We will uphold application of the law if there is a "rational basis" for the congressional determination that the regulated activity "affects interstate commerce," and if the means chosen to regulate the activity are reasonable. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981); *United States v. Frame*, 885

---

[9] As its text indicates, the regulation requires proof only that certain types of events could affect interstate commerce if they occurred in the particular isolated wetland, not, as the Pozsgais contend, proof that a particular discharge into that wetland could affect interstate commerce.

F.2d 1119, 1126 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094, (1990). [10]

In contending the Constitution requires an individualized effect on interstate commerce, the Pozsgais rely on cases construing other federal statutes -- the Sherman Act, the Hobbs Act, the federal arson statute, and two federal labor statutes -- which do require an individualized showing. But these cases demonstrate only that in those statutes, Congress chose to satisfy the Commerce Clause by requiring an individualized interstate commerce effect in each application of the law. The Clean Water Act, by contrast, handles the interstate commerce nexus differently. Under the Act, the Corps, acting under its statutorily delegated authority to establish the permit program, 33 U.S.C. § 1344, has determined that wetlands which are adjacent to tributaries of waters usable or formerly used in interstate commerce themselves affect interstate commerce. Several other Courts of Appeal have upheld this regulation against constitutional attack on the ground that congressional regulation of water pollution is permissible under the Commerce Clause, *United States v. Byrd*, 609 F.2d 1204, 1209 (7th Cir. 1979), *United States v. Tull*, 769 F.2d at 185, *United States v. Ashland Oil*, 504 F.2d at 1325, and the Supreme Court has upheld this reasoning. *Hodel*, 452 U.S. at 282 ("we agree with the lower federal courts that have uniformly found the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water pollution").

The Pozsgais seek to distinguish these cases, contending the challenged activities in each of them involved "substantial effects" on interstate commerce, and arguing the government established no such effects here. But even assuming Congress' Commerce Power is circumscribed by a "substantiality" requirement, the Pozsgais misapply this standard. In contending their discharge activities did not have substantial effects on interstate commerce, the Pozsgais ignore the well-settled principle that "where the class of activities is regulated and that class is within the reach of the federal [commerce] power, the courts have no power 'to excise, as trivial, individual instances'

---

[10] This test also applies where a party challenges a regulation promulgated by an agency acting under its statutorily delegated authority. See *United States v. Byrd*, 609 F.2d 1204, 1209 (7th Cir. 1979) (upholding Corps' wetlands regulation against Commerce Clause challenge).

of the class." *Perez v. United States*, 402 U.S. 146, 154 (1971) (quoting *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968)). The Pozsgais claim this so-called "cumulative effect" principle is inapplicable because wetlands above the headwaters, as a "class of activities," do not substantially affect interstate commerce. But the only evidence they offer in support of this argument is the Corps' decision to regulate these wetlands under Nationwide Permit 26. As discussed above, however, by the regulation's terms, this classification has no significance for interstate commerce purposes.

The Pozsgais also argue the cumulative effect principle has no application to wetlands generally. In announcing this principle to hold that federal production quotas could constitutionally be applied to a farmer who grew wheat for his own consumption in *Wickard v. Filburn*, 317 U.S. 111 (1942), the Supreme Court stressed that in the aggregate, home consumption of wheat competed with wheat grown for sale and therefore affected interstate commerce. The Pozsgais contend that discharge into wetlands cannot be similarly aggregated because their filling activities cannot be added to filling activities in California or Texas which involve other aquatic systems.

This reasoning is factually and legally flawed. In factual terms, it ignores that discharge by other property owners into wetlands above the headwaters within the same aquatic system as the Pozsgais clearly should be aggregated with the Pozsgais' discharge to determine the amount of pollution in that system. As a legal matter, we find no language in *Wickard* or its progeny requiring a showing of local or regional aggregation. Indeed, it would be illogical to impose such a requirement on the Corps of Engineers in the course of making national water pollution policy. The regulation reflects the Corps' expert determination that, in the aggregate, discharge into wetlands above the headwaters which are adjacent to tributaries of waters used or usable in interstate commerce, increases water pollution.[11]

---

[11] The regulations reveal the Corps gave serious consideration to this issue. The interim final regulation issued on July 25, 1975, excluded waters and wetlands above the headwaters from the category of "waters of the United States" and therefore from the Act's coverage, except upon the District Engineer's specific determination that regulation of these waters "was necessary to protect water quality." 42 Fed. Reg. 37129. In the final regulations, issued two years later, in response to "comments and criticisms . . . concerning . . . the legality of excluding waters in rivers and streams

(continued...)

It matters not whether the increase is substantial in a particular region, or just in the nation as a whole. *Compare Perez v. United States*, 402 U.S. at 155 (finding Wickard applies to loan sharking, a $ 350 million per year national business, without discussing cumulation of particular transactions in regional or local credit markets). For these reasons, we hold that application of the Corps' wetlands regulation to the Pozsgais' discharge activities did not violate the Commerce Clause. [12]

VI.

We now turn to the Pozsgais' appeal from various orders entered by the district court during the course of this litigation. The Pozsgais contend the district court's contempt order was defective because, although labeled as "civil" contempt, the order was in fact "criminal" contempt. The two types of contempt differ in important respects. Civil contempt is remedial in nature, serving to coerce compliance with a court order or to compensate the other party for losses sustained due to noncompliance. By complying with the order, a civil contemnor can purge the contempt. Criminal contempt, by contrast, is a punitive sanction, designed to vindicate the court's authority for the contemnor's past non-compliance with a court order, and therefore cannot be cured by the contemnor. *Hicks on Behalf of Feiock v. Feiock*, 485 U.S. 624, 631-32 (1988); 11 Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure* § 2960 at 583-85 (1973).

The purpose and nature of the sanction, rather than the label attached to it, determine whether it is civil or criminal. *Hicks*,

---

[11] (...continued)
above the headwaters from the definition of waters of the United States," the Corps decided to regulate waters and wetlands above the headwaters through the nationwide permit mechanism rather than by excluding them from the definition of covered waters. *Id.* We cannot say the Corps did not have a rational basis for this determination. *Cf. Riverside Bayview*, 474 U.S. at 134 (Corps' determination that "waters of the United States" include adjacent wetlands was reasonable because it was based on Corps' and EPA's technical expertise).

[12] In view of our disposition on the merits of the Pozsgais' appeal, we need not and do not reach the government's contention that John Pozsgai is collaterally estopped from raising these issues because they were resolved against him on his criminal conviction.

485 U.S. at 631. The two types of contempt also have different burdens of proof. Civil contempt must be proved by "clear and convincing" evidence, *Quinter v. Volkswagen of America*, 676 F.2d 969, 974 (3d Cir. 1982), while criminal contempt must be proved beyond a reasonable doubt, *Hicks*, 485 U.S. at 632. To be valid, a criminal contempt proceeding must comport with Federal Rule of Criminal Procedure 42(b), which requires such proceedings to be "prosecuted on notice . . . stating the time and place of hearing, allowing a reasonable time for the preparation of the defense, . . . stating the essential facts constituting the criminal contempt, and describing it as such."

Here, the district court found Pozsgai in contempt for his past violations of the TRO against filling on the property, and ordered him to pay $ 5,000 within 48 hours or be put in jail. Although the order contains aspects of civil contempt, two significant features convince us it qualifies as criminal contempt. First, it was retroactive in nature, seeking to penalize previous violations. Second, it was punitive rather than remedial, because it did not compensate the government, but rather sought to vindicate the authority of the Court to enjoin Pozsgai from continuing his filling activities.

We believe the court afforded Pozsgai the protections necessary for a valid finding of criminal contempt. The Pozsgais contend the district court's failure to label the contempt as criminal in the hearing notice violated Rule 42(b), that this error was compounded by the government's request for "civil" contempt in its petition for an order to show cause, and that these errors render the proceeding invalid. We disagree. The government's petition for an order to show cause specifically enumerated past violations for which it sought contempt sanctions. Additionally, the government expressly requested not only that Pozsgai be incarcerated until he complied with the TRO, a civil contempt sanction, but also requested that he be incarcerated five days for each prior violation and fined $ 25,000 for each continued violation. Because the government sought a retroactive sanction, we believe its petition put Pozsgai on notice of the criminal nature of the contempt proceeding.

Additionally, we do not believe Pozsgai was prejudiced by the timing of the notice. The Supreme Court has held a district court's failure to label a contempt proceeding as criminal in the hearing notice is grounds for reversal only when the failure causes "substantial prejudice" to the defendant resulting from his lack of awareness that the proceeding is criminal. *United States v. United Mine Workers of America*, 330 U.S. 258, 297-98

(1946). Pozsgai has not argued, nor presented any evidence, that "a more explicit motion . . . would have aided him in the preparation of his defense." *United States v. Partin*, 524 F.2d 992, 999 (5th Cir. 1975), *cert. denied*, 425 U.S. 904 (1976). His defense consisted entirely of testimony denying he had violated the TRO. The court chose not to believe him, expressly finding "beyond any doubt whatsoever" not only that Pozsgai knew of the post-TRO dumping but also that it occurred with his approval. The videotape recording this activity provided overwhelming support for this conclusion. [13] Accordingly, we will affirm the district court's order of contempt.

The Pozsgais' final claims concern the district court's restoration order, which directed removal of fill material from the wetlands portion of the Pozsgais' property and redeposit of the material on the non-wetlands portion of the property. The Pozsgais object to the order on three grounds: (1) that it violates Fed. R. Civ. P. 65(d)'s standards for injunctive remedies because it fails to describe specifically the area of the property to be restored; (2) that the order itself was an abuse of discretion given the small degree of harm caused by the discharge and his financial inability to comply with it; and (3) that the court was wrong to deny the Pozsgais' Fed. R. Civ. P. 60(b) motion for relief from the restoration order seeking control over where on their property the restoration of the fill would take place.

With respect to the particularity of the restoration order, we note the injunction anticipated further negotiation between the Pozsgais and the government regarding the restoration plan, and that such negotiation has taken place, most recently in the parties' August 15, 1991 stipulation to a new map detailing the

---

[13] We note the government's petition and the court's order to show cause provided Pozsgai with the essential facts underlying its request for contempt sanction. *United States v. Onu*, 730 F.2d 253, 257 (5th Cir.), *cert. denied*, 469 U.S. 856 (1984). The order to show cause gave Pozsgai notice of the time and place of the hearing, and the court scheduled a hearing a week after the order, which was a reasonable time to prepare a defense. *United Mine Workers*, 330 U.S. at 296 (order to show cause can serve notice function of Rule 42(b)); *United States v. Powers*, 629 F.2d 619, 625 (9th Cir. 1980) (five-day notice period allowed for hearings in Fed. R. Crim. P. 45(d) adequate preparation time for purposes of Rule 42(b)).

wetland areas to be restored. [14] We reject the Pozsgais' contention that the restoration order was inequitable because of the small degree of harm caused by their discharge and their financial inability to comply with the order. The undisputed facts demonstrating the Pozsgais' repeated noncompliance with the Act and with the Corps' directives to stop filling foreclose any such equitable argument.

Finally, we consider the Pozsgais' motion for relief from judgment, in which they seek control to determine the location on the property where the material is redeposited. Denying the motion, the district court found it would be inequitable to give the Pozsgais such veto power -- particularly now that the haulers have completed their work -- because the Pozsgais caused the improper filling and refused to remedy the condition. We agree fully with this reasoning. Accordingly, we believe the district court did not abuse its discretion in fashioning the restoration order.

VII.

For the foregoing reasons, we will affirm the judgment of the district court.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

---

[14] In the same vein, the Pozsgais appeal the temporary restraining order, arguing the court failed to "set forth reasons" as required by Fed. R. Civ. P. 65(d). The TRO states it was "upon consideration of the government's motion," and states that defendants "are immediately ordered to cease and desist from discharging fill material onto the site" and "ordered to cease and desist their further violation of the Clean Water Act, 33 U.S.C. § 1311(a)." We believe that under the circumstances of this case, the court's statement gave the Pozsgais adequate notice of the grounds for the TRO.

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
v.
JOHN POZSGAI et al.
Civil Action No. 88-6545

June 17, 1991, Decided
June 18, 1991, Filed

OPINION: MEMORANDUM AND ORDER

The United States instituted this action alleging that the defendants discharged fill, without a permit, into protected wetlands in violation of the Clean Water Act, 33 U.S.C. § 1311(a). The site in question is a fourteen acre tract of land located in Bucks County, Pennsylvania owned by defendants John and Gizella Pozsgai. On August 24, 1988, I issued a temporary restraining order against further dumping at the site and granted the government's motion for a preliminary injunction on September 16, 1988. After a final hearing on December 16, 1988, I issued a memorandum and order containing findings of fact and conclusions of law on January 8, 1990. I found the Pozsgais strictly liable for the discharge of fill material without a permit into protected wetlands located on their site.

Presently pending is the Pozsgais' motion for reconsideration of and to vacate my January 8, 1990 order, or for a new trial. The defendants essentially raise three grounds for relief. First, the Pozsgais contend that the evidence is insufficient to support a finding that their site contains protected wetlands. Second, they assert that the evidence is insufficient to prove that they discharged "pollutants" into "water." Finally, they argue that their wetlands were eligible for filing under a nationwide permit.

The government, in response, contends that the court's January 8, 1990 findings of fact and order should stand without modification. The government notes that the defendants' three arguments were litigated in a separate criminal action against John Pozsgai. His conviction was affirmed without opinion by the United States Court of Appeals for the Third Circuit on January 12, 1990. In its response to the Pozsgais' motion, the

government incorporates the arguments set forth in its appellate brief.

a. protected wetlands

The Pozsgais initially contend that there is insufficient evidence to support a finding that the small stream on their property is a tributary of the Pennsylvania Canal and that the Pennsylvania Canal is used in interstate commerce. Thus, the Pozsgais argue, the wetlands on their property cannot be considered "waters of the United States" within the jurisdiction of the Clean Water Act [CWA]. I found that the " Pozsgai site . . . Is adjacent to an unnamed tributary of the Pennsylvania Canal, which flows into the Delaware River." Memorandum and order at 1.

The CWA bars the discharge of any pollutant into "navigable waters" absent a permit. 33 U.S.C. §§ 1311(a), 1344(a). Navigable waters are defined as "waters of the United States. " 33 U.S.C. § 1362(7). Federal regulations define "waters of the United States" as all waters that "are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce." 33 C.F.R. § 328.3(a)(1). The regulations also define waters as "wetlands adjacent to" waters used in interstate commerce. Id. § 328.3(a)(7). Adjacent is defined as meaning "bordering, contiguous, or neighboring." *Id.* § 328.3(c).

There is sufficient evidence to show that the unnamed tributary on the Pozsgais' land flows into the Pennsylvania Canal. Martin Miller from the Corps of Engineers testified that the unnamed tributary flowed into the "Delaware Canal which eventually reached the Delaware River." 9/9/88 Transcript at 15-16. The defendants make much of the fact that the witness used the phrase "Delaware Canal" instead of "Pennsylvania Canal." However, it is obvious from the context of his testimony that the witness was speaking of the Pennsylvania Canal. Further, the aerial photographs introduced into evidence support the finding that the unnamed tributary flows into the Pennsylvania Canal. See 9/9/88 Transcript at 36-38, 43 (testimony of M. Claffey).

Second, the Pozsgais argue that there is no evidence the Pennsylvania Canal is used in interstate commerce. The government merely states that "it cannot be seriously disputed that the Pennsylvania Canal is a navigable waterway within the meaning of 33 C.F.R. § 328.3(a)(1)." Government's appellate brief at 27 n.19.

The reach of the CWA has been broadly construed. The Army Corps of Engineers jurisdiction under the Act has also been construed broadly. United States v. Akers, 651 F. Supp. 320, 323 (E.D. Cal. 1987). For example, it has been held that Congress intended the CWA to reach non-navigable, man-made mosquito canals. United States v. Holland, 373 F. Supp. 665, 673 (M.D. Fla. 1974). As one court explained:

while there is nothing in this record to show the effect on interstate commerce of this unnamed tributary, without question it is within the intended coverage of the [CWA]. It was flowing a small amount of water at the time of the spill.

Whether or not the flow continued into the [river] at that time, it obviously would during a significant rainfall.

United States v. Texas Pipe Line Co., 611 F.2d 345, 347 (10th Cir. 1979). The fact that the Pennsylvania Canal flows into the Delaware River is enough to satisfy the interstate commerce requirement. *Quivira Mining Co. v. E.P.A.*, 765 F.2d 126, 130 (10th Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986). Therefore, defendants' argument is without merit.

b. discharge of pollutants into water

The Pozsgais second argument is that the evidence is insufficient to show that they discharged "pollutants" into "water." I found that the Pozsgais were discharging "fill material" onto their property, which is protected wetlands, without a permit. Memorandum and order at 1, 2. The Pozsgais assert that the phrase "fill material" does not appear in the definition of pollutant at 33 U.S.C. 1362(6). The defendants also argue that the term "wetlands" does not appear in the CWA, so that there is no evidence they discharged into "water."

The CWA provides that "the discharge of any pollutant by any person" without a permit shall be unlawful. 33 U.S.C. § 1311(a). "Pollutant" is defined as "dredged spoil, solid waste . . . biological materials . . . rock, sand . . . municipal, and agricultural waste discharged into water." Id. § 1362(6).

First, it is clear that defendants discharged a pollutant in violation of § 1311(a). Fill material or dirt dumped on wetlands are pollutants under § 1362(6). *Hanson v. United States*, 710 F. Supp. 1105, 1108 (E.D. Tex. 1989); *Matter of Alameda Co.*

Assessor's Parcels, 672 F. Supp. 1278, 1284 (N.D. Cal. 1987); *United States v. Weisman*, 489 F. Supp. 1331, 1337 (M.D. Fla. 1980). Furthermore, the evidence shows that the defendants placed "concrete rubble" and "cinder block," which are covered by the express terms of § 1362, on their wetlands. 9/9/88 Transcript at 40, 56. There was also evidence that the property had been cleared of most of its vegetation. Id. at 16-17, 42; 12/16/88 Transcript at 27. The clearing of vegetation from wetlands and the redeposit of that waste on the wetlands is the discharge of a pollutant into water. *Avoyelles Sportmen's League, Inc. v. Marsh*, 715 F.2d 897, 922-925 (5th Cir. 1983).

Second, it is clear that "water" includes wetlands. The defendants argue that the term "wetlands" appears no where in the CWA, and thus § 1311(a) does not apply to the deposit of "earth on other earth."

Federal regulations have defined "water" as including "wetlands." 33 C.F.R. § 328.3(a). The Supreme Court has upheld the treatment of adjacent wetlands as waters of the United States. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 129-30 (1985).

The Pozsgais unconvincingly attempt to distinguish Riverside. They assert that *Riverside* only addressed the "regulation of wetlands adjacent to open bodies of water and expressly left open the question as to whether regulation of isolated wetlands" is permissible. The Pozsgais are correct in that *Riverside* did not consider the regulation of nonadjacent wetlands. Id. at 131 n.8. Thus, it appears the Pozsgais are arguing their wetlands are isolated. However, their wetlands are adjacent to the stream on their property which flows into the Pennsylvania Canal. Specifically, "wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" 33 C.F.R. § 328.3(c). Thus, the courts have broadly construed the adjacency requirement to find that the wetlands in question are covered by the CWA even when the wetlands were separated by some distance or by barriers from the waterbody. *E.g., United States v. Ciampitti*, 583 F. Supp. 483, 494 (D.N.J. 1984), aff'd, 772 F.2d 893 (3d Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986).

Therefore, this ground is meritless.

c. nationwide permit

The defendants' final contention is that Nationwide Permit No. 26, set forth at 33 C.F.R. § 330.5(a)(26), applies to their property.

Nationwide Permit 26 permits discharges "except those which cause the loss or substantial adverse modification of 10 acres or more of such waters of the United States. " 33 C.F.R. 330.5(a)(26). However, this permit is not applicable until the Commonwealth issues a water quality certification for the proposed action. 33 U.S.C. § 1341(a)(1); 33 C.F.R. §§ 330.5(b)(11), 330.9(b)(3). Section 1341(a)(1) of the CWA specifically provides that "any applicant for a Federal . permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the . . . permitting agency a certification from the State." Federal regulations specifically require such a certification for Nationwide Permit 26. 33 C.F.R. § 330.9(b)(3). For states that generally deny certification for Nationwide Permit 26, the applicant must obtain a water quality certification or a waiver of such on an individual basis. Id. § 330.9(a). Finally, where the applicant has obtained the water quality certification, if his proposed action impacts more than one acre of wetlands, he must comply, before discharge, with the notification procedure of 33 C.F.R. § 330.7. 33 C.F.R. § 330.5(a)(26).

The Pozsgais admit in their motion that they have not complied with the water quality certification requirement. Furthermore, the evidence shows that at least five acres of the Pozsgais property was affected by their illegal discharge. Thus, the Pozsgais should have complied with the notification requirements of 33 C.F.R. § 330.7. Instead, the Pozsgais merely contend, without any explanation or elaboration, that the Corps of Engineers had predischarge notification. However, the government, in its appellate brief, states that the Pozsgais are asserting that the Corps had constructive notice. Constructive notice is never satisfactory since the notice required by § 330.7 must be in writing. 33 C.F.R. § 330.7(b). Thus, this ground is meritless since the Pozsgais did not comply with the water quality certification requirement, and offer no proof that they complied with the predischarge notification requirement.

An appropriate order follows.

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
v.
JOHN POZSGAI et al.
Civil Action No. 88-6545

ORDER

AND NOW, this 17th day of June, 1991, it is ORDERED that John and Gizella Pozsgai's motion for reconsideration of and to vacate this court's January 8 order, or for a new trial is DENIED.

/s/John P. Fullam
Fullam, Sr. J.

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
v.
JOHN POZSGAI et al.
Civil Action No. 88-6545

January 8, 1990, Decided
January 8, 1990, Filed

Fullam, Ch.J.

MEMORANDUM AND ORDER

The United States brought this action under the Clean Water Act, alleging that defendants discharged fill, without a permit, into protected wetlands in violation of 33 U.S.C. § 1311(a). The site in question, a 14-acre tract of land located in Bucks County, Pennsylvania, is owned by defendants John and Gisella Posgai. I issued a temporary restraining order against further dumping at the site on August 24, 1988 and granted the government's motion for a preliminary injunction on September 16, 1988. A final hearing was held on December 16, 1988.

FINDINGS OF FACT

1. Defendant Pozgai

1. The Pozsgai site, located on West Bridge Street between Routes 1 and 1A in Falls Township, is adjacent to an unnamed tributary of the Pennsylvania Canal, which flows into the Delaware River. The site was and is protected wetlands, and as such performs critical environmental functions.

2. In April 1987, the U.S. Army Corps of Engineers learned that fill material was being discharged at the site without a permit. At the time the Corps began its investigation, defendants John and Gisella Pozsgai were prospective buyers of the property, and Pozsgai had already arranged for the discharge of fill onto the site. The Pozsgais became owners of record of the property on June 19, 1987. Between April 1987 and November 1987, The Corps repeatedly warned John Pozsgai, both orally and by issuance of a cease and desist letter, not to continue filling the site until he obtained the permits required by the Clean Water Act. Each time the Corps biologist visited the

site, he noted that substantial additional filling had taken place since his previous visit.

3. On December 17, 1987, the Corps issued an administrative directive instructing them to cease and desist the filling activity and remove the fill within 45 days, or to cease and desist filling and apply for an "after the fact" permit within 10 days. Pozsgai did not apply for a permit and continued to fill the site through 1988.

4. I issued a temporary restraining order on August 24, 1988. John Pozgai continued to have fill discharged at the site and to use his bulldozer to level the fill. After a two-day hearing, I held Pozsgai in contempt of court on September 16, 1988.

2. Defendant Vinch

5. J. Vinch & Sons, Inc. is a company that has been engaged in the business of demolition, excavation and hauling since 1970. A part of Vinch's daily operations is finding locations to dispose of the debris generated by its
excavation and demolition activities.

6. Vinch owns and operates a state-licensed landfill in New Jersey.

7. Vinch knew or should have known that local and state permits are frequently required for the disposal of solid waste. Vinch, which does business in Mercer County, New Jersey, also knew or should have known that by county ordinance, all waste from the county that it did not dispose of at its own landfill was required to be disposed of at the Grows landfill in Falls Township,
Pennsylvania.

8. Between May 1987 and August 1988, Vinch disposed of 340 loads of fill at the Pozsgai site. Each load contained 16 to 20 cubic yards of dirt and concrete, for a total of at least 6800 cubic yards of fill.

9. Vinch would have had to pay $ 22 per cubic yard to dispose of fill at the Grows landfill, but was allowed by Pozsgai to dispose of fill at a cost of $ 1 to $ 1.25 per cubic yard ($ 20 per load), for a savings of at least $ 142,800.

10. Pozsgai told Vinch that the rear of his site contained wetlands. Vinch did not have a permit to dispose of fill at the Pozsgai site, nor did Vinch ask whether Pozsgai had any permits.

11. Vinch also reached an agreement in principle with Pozsgai to purchase five acres of the site, but only if there were no environmental or permit problems.

12. Vinch knew or should have known that discharging fill onto the site was a violation of federal law.

3. Defendant Mercer

13. Mercer Wrecking and Recycling Corp. has been engaged in the business of demolition and metal and concrete recycling for three years.

14. In 1985, Mercer disposed of three of four truckloads of bricks at the site at Pozsgai's request.

15. On May 11, 1988, a Corps biologist called Mercer and warned the company that the discharge of fill at the Pozsgai site without a permit was a violation of the Clean Water Act.

16. By July 1988, Mercer had disposed of 25 loads of rock and eight loads of stone at the site.

17. In June or July 1988, Mercer disposed of 50 loads (16 cubic yards each) of dirt at the site.

18. Pozsgai did not charge Mercer for dumping fill material, saving Mercer $ 22 per cubic yard (what Mercer would have paid at the Grows landfill), for a total savings of at least $ 30,262 (86 loads of 16 cubic yards each times $ 22 per load).

19. Mercer did not have a permit to dump at the Pozsgai site, nor did Mercer ask Pozsgai whether he had any permits.

20. Mercer knew or should have known that discharging fill onto the site was a violation of federal law.

4. The Restoration Plan

21. The Corps has submitted a feasible restoration plan to remove the fill and restore the Pozsgai site to its wetlands condition. This plan will confer maximum environmental benefits consistent with its feasibility and its equitable relationship to the degree and kind of harm perpetrated by the defendants.

CONCLUSIONS OF LAW

1. The Pozsgai site contained and still contains protected wetlands. See 33 U.S.C. §§ 1251-1376; 33 C.F.R. §§ 209.120, 323.2-3; 328.3.

2. The Clean Water Act imposes strict liability upon persons who discharge fill into wetlands without obtaining an Army Corps of Engineers permit. See 33 U.S.C. §§ 1311, 1344.

3. Defendants John and Gisella Pozsgai own the Pozsgai site and are strictly liable for the discharge of fill material without a permit into protected wetlands located on the site.

4. Defendants J. Vinch & Sons, Inc. and Mercer Wrecking and Recycling Corp. are also strictly liable for the discharge of fill material without a permit into protected wetlands located on the site.

5. The United States is entitled to a permanent injunction against any further filling and to a restoration order.

An appropriate order follows.

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
v.
JOHN POZSGAI et al.
Civil Action No. 88-6545

ORDER

AND NOW, this 8th day of January, 1990, it is ORDERED:

1. Defendants are PERMANENTLY ENJOINED from any further filling at the Pozsgai site without first obtaining a permit from the Army Corps of Engineers.

2. The restoration plan submitted by the Corps is amended as follows: in numbered paragraphs 10 and 11 of the plan, "1990" is substituted for "1989."

3. The restoration plan submitted by the Corps will be implemented by all the defendants, each to bear a share of the costs proportionate to his/its responsibility for the damage done to the site. If the parties cannot agree upon the relative responsibility of each defendant, they are directed to submit their positions on this issue to the court within 15 days.

/s/John P. Fullam, Ch.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1454

UNITED STATES OF AMERICA
v.
JOHN POZSGAI, GIZELLA POZSGAI, MERCER WRECKING & RECYCLING CORPORATION, J. VINCH & SONS, INC.,
John Pozsgai and Gizella Pozsgai,
Appellants

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 88-06545)

Argued January 8, 1993

Before: HUTCHINSON and SCIRICA, Circuit Judges
and STANDISH, District Judge*

ORDER

The Court treats appellants' counsel's letter of July 8, 1993, as a petition for panel rehearing and a motion to amend the opinion dated June 25, 1993.

The motion to amend is denied, and the petition for panel rehearing is denied.

BY THE COURT:

/s/Anthony Scirica
Circuit Judge

Dated: Aug. 10, 1993

* The Honorable William L. Standish, United States District Judge for the Western District of Pennsylvania, sitting by designation.

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
v.
JOHN POZSGAI et al.
Civil Action No. 88-6545

ORDER

AND NOW, this 30th day of March 1992, upon review of the docket in this case and all outstanding matters, it is hereby ORDERED as follows:

1) The United States' Motion to Dismiss the Pozgais' counterclaim in GRANTED and JUDGMENT is ENTERED on the counterclaim against the Pozgais and in favor of the United States in accordance with this Court's prior Orders;

2) JUDGMENT is ENTERED on the cross-claim of J. Vinch & Sons, Inc. against Vinch and in favor of the Pozgais in accordance with this Court's prior Orders;

3) The motions of the United States, Vinch, and Mercer Wrecking and Recycling Corp. for reconsideration or to alter or amend the judgment are DENIED;

4) FINAL JUDGMENT is entered in favor of the United States and against the defendants Pozgai in accordance with the Court Orders.

BY THE COURT:

/s/John P. Fullam
FULLAM, Sr. J.

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
v.
JOHN POZSGAI et al.
Civil Action No. 88-6545

MEMORANDUM AND ORDER

FULLAM, Sr.J. FEBRUARY 25, 1992

This court's Order of June 18, 1991, as amended August 15, 1991, included the following provision:

> "12. Vinch and Mercer may deposit elsewhere on the Pozgai property the fill material removed from their respective areas,provided that such placement meets both of the following two conditions: (1) that the fill removed by Vinch and Merger not be deposited in any location which the Corps has designated as wetlands; and (2) that such placement of fill not violate any, federal state or local statute, regulation, ordinance or requirement."

The two contractors, Vinch and Mercer, have completed their work on the property, having deposited fill material removed from the wetlands portion of the property to other portions of the Pozgai property. Mr. and Mrs. Pozgai now seek relief from judgment, in the form of an interpretation of the quoted language as precluding the contractors, Vinch and Mercer, from depositing fill on the balance of the property without the Pozgais' consent; it is the Pozgais' contention that the contractors should now be required to remove the fill which they have deposited.

The motion will be denied. There is nothing in the order which gives Mr. and Mrs. Pozgai veto power over the restoration process, and it would plainly be inequitable at this late date to impose that additional condition (the Pozsgais' antecedent consent) nunc pro tunc.

It must be remembered that it was the Pozg ais who caused the wetlands to be improperly filed, and who stea idfastly refused to remedy the situation. If they are dissatisfied w vith the present location of the fill materials, it is within their po wer to remedy the situation by removing the fill elsewhere --jus t as they could have removed the fill from the wetlands in the first instance. Their motion for relief pursuant to F.R.Civ.P. 60(b) will be denied.

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
v.
JOHN POZSGAI et al.
Civil Action No. 88-6545

ORDER

AND NOW, this 25th day of February, 1992, it is ORDERED:

That the motion of defendants John and Gizella Pozgai for relief from the court's remedial order of June 18, 1991, under Rule 60(b) of the Federal Rules of Civil Procedure is DENIED.

/s/ John P. Fullam
Sr.J.

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
v.
JOHN POZSGAI et al.
Civil Action No. 88-6545

ORDER TO SHOW CAUSE

Upon the motion of Edward S. F. Dennis, Jr., United States Attorney for the Eastern District of Pennsylvania, it is hereby

ORDERED that Defendant John Pozgai appear before the United States District Court for the Eastern District of Pennsylvania, in Courtroom 17, United States Courthouse, 601 Market Street, Philadelphia, Pennsylvania, on the 8th day of September, 1988 at 9:30 A.M., to show cause why he should not be held in contempt of the Temporary Restraining Order signed by the Court on August 24, 1988, which was served that date. It is further

ORDERED that a copy of this Order, the Motion, and the supporting Memorandum be served upon the above-named defendant by regular first-class mail on or before the 6th day of September, 1988.

The facts constituting the alleged contempt are the failure of defendant John Pozsgai to comply with the Temporary Restraining Order entered and served on August 24, 1988, by continuing the discharge and arranging for the discharge of fill material into federally protected wetlands since that date.

/s/ Robert S. Gawthrop, III, J.

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
v.
JOHN POZSGAI et al.
Civil Action No. 88-6545

TEMPORARY RESTRAINING ORDER
AND ORDER SETTING HEARING

AND NOW, this 24th day of August, 1988, upon consideration of the Government's Motion for Temporary Restraining Order pursuant to Rule 65 of the Federal Rules of Civil Procedure, it is hereby

ORDERED

1. Defendants John Pozsgai, Gizella Pozsgai, Mercer Wrecking & Recycling Corporation and J. Vinch & Sons, Inc. are immediately ordered to cease and desist from discharging fill material onto the site located at Tax Parcel 13-28-83, West Bridge Street, Falls Township, Bucks County, Pennsylvania.

2. Defendants are ordered to cease and desist their further violation of the clean Water Act, 33 U.S.C. §1311(a).

3. That a hearing shall be scheduled in this matter for 9:30 a.m. on September 8, 1988, in courtroom , 601 Market Street, Philadelphia, PA.

SO ORDERED:

/s/ Franklin S. Van Antwerpren

33 U.S.C. § 1311. Effluent limitations

(a) **Illegality of pollutant discharges except in compliance with law.** Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this act [33 USCS §§ 1312, 1316, 1317, 1328, 1342, 1344], the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1319

(c) (2) Knowing violations. Any person who--

(A) knowingly violates section 301, 302, 306, 307, 308, 318, or 405 of this Act [33 USCS § 1311, 1312, 1316, 1318, 1328, or 1345], or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act [33 USCS § 1342] by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 402(a)(3) or 402 (b)(8) of this Act [33 USCS § 1342(a)(3) or (b)(8)] or in a permit issued under section 404 of this Act [33 USCS § 1344] by the Secretary of the Army or by a State; or

* * *

shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

33 U.S.C. § 1344. Permits for dredged or fill material

(a) **Discharge into navigable waters at specified disposal sites.** The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

* * *

(e) **General permits on State, regional, or nationwide basis.** (1) In carrying out his functions relating to the discharge of dredged or fill material under this section, the Secretary may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Any general permit issued under this subsection shall (A) be based on the guidelines described in subsection (b)(1) of this section, and (B) set forth the requirements and standards which shall apply to any activity authorized by such general permit.

33 U.S.C. § 1362. Definitions.

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.***

33 C.F.R. § 328.3. Definitions.

For the purpose of this regulation these terms are defined as follows:

(a) The term "waters of the United States" means

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.

* * *

(b)The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

33 C.F.R. 330.5 Nationwide permits

(a) *Authorized activities*. The following activities are hereby permitted provided they meet the conditions listed in paragraph (b) of this section and, where required, comply with the notification procedures, of § 330.7.

* * * *

(26) Discharges of dredged or fill material into the waters listed in paragraphs (a)(26)(i) and (ii) of this section except those which cause the loss or substantial adverse modification of 10 acres or more of such waters of the United Sates, including wetlands. For discharges which cause the loss or substantial adverse modification of 1 to 10 acres of such waters, including wetlands, notification to the district engineer is required in accordance with section 330.7 of this section. (Section 404)

(i) Non-tidal rivers, streams, and their lakes and impoundments, including adjacent wetlands, that are located above the headwaters.

(ii) Other non-tidal waters of the United States, including adjacent wetlands, that are not part of a surface tributary system to interstate waters or navigable waters of the United States (i.e., isolated waters).

Supreme Court, U.S.
FILED
JAN 10 1994
OFFICE OF THE CLERK

No. 93-733

In The

Supreme Court of the United States

October Term, 1993

JOHN POZSGAI and GIZELLA POZSGAI,

Petitioners,

v.

UNITED STATES OF AMERICA,
MERCER WRECKING & RECYCLING CORPORATION,
J. VINCH & SONS, INC.,

Respondents.

On Petition For *Writ* Of *Certiorari*
To The United States Court Of Appeals
For The Third Circuit

BRIEF *AMICI CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION, THE ALLIANCE FOR AMERICA, AND THE FAIRNESS TO LAND OWNERS COMMITTEE IN SUPPORT OF PETITIONERS

PAUL M. SILBY
WILLIAM PERRY PENDLEY*
(*Counsel of Record)
MOUNTAIN STATES LEGAL FOUNDATION
1660 Lincoln Street, Suite 2300
Denver, Colorado 80264
(303) 861-0244

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

IDENTITIES AND INTERESTS OF *AMICI CURIAE* ... 2

OPINIONS BELOW, JURISDICTION, STATUTES INVOLVED AND STATEMENT OF THE CASE... 3

SUMMARY OF THE ARGUMENT 3

REASONS FOR GRANTING THE *WRIT*..... 4

I. INTRODUCTION: SECTION 404: THE GOVERNMENT'S PENCHANT FOR OVERREGULATION..... 4

A. THE REGULATORY HYDRA: REGULATING DRY LAND 8

1. THE CORPS' REGULATIONS PURPORT TO REGULATE ONLY TRULY AQUATIC AREAS 8

2. NATIONWIDE REACTION TO THE CORPS/EPA'S DRY "LAND GRAB"... 9

B. THE PENCHANT FOR OVERREGULATION SIGNIFICANTLY IMPACTS THE REGULATED COMMUNITY 11

II. IN ENACTING THE CLEAN WATER ACT, CONGRESS DID NOT INTEND TO INCLUDE ALL AREAS THAT MEET REGULATORY WETLANDS DEFINITION WITHOUT REGARD TO THE EFFECT OF THEIR USE ON INTERSTATE COMMERCE 12

A. THE CLEAN WATER ACT DOES NOT REACH TO THE CONSTITUTIONAL LIMIT OF THE CONGRESSIONAL POWER TO REGULATE INTERSTATE COMMERCE..... 13

TABLE OF CONTENTS – Continued

Page

B. THE "EFFECT ON COMMERCE TEST" IS AN ESSENTIAL ELEMENT IN DETERMINING WHETHER AN ACTIVITY COMES WITHIN THE COMMERCE CLAUSE..... 14

C. CONGRESS NEVER EXPLICITLY REQUIRED THE REGULATION OF ALL ACTIVITIES THAT IN ANY WAY AFFECT ANY AREAS CONTAINING WETLANDS MEETING THE CORPS' AND EPA'S REGULATORY DEFINITION..... 16

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

1902 Atlantic, Ltd. v. Hudson, 574 F. Supp. 1381 (E.D. Va. 1983) 5, 6

Construction Aggregate Transport, Inc. v. Fla. Rock Industries, Inc., 710 F.2d 752 (11th Cir. 1983) 13

Del Rio Distributing Co., Inc. v. Adolph Coors Co., 589 F.2d 176 (5th Cir. 1979) 14

Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) 13

Harrison v. P.P.G., 446 U.S. 578 (1980) 8

Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) 17

Hodel v. Virginia Surface Mining and Reclamation Assn., 452 U.S. 264 (1981) 13, 15, 18

Katzenbach v. McClung, 379 U.S. 294 (1964) 17

McClain v. Real Estate Board of New Orleans, Ins., 444 U.S. 232 (1980) 14

Perez v. United States, 402 U.S. 146 (1971) 17, 18

United States v. Darby, 312 U.S. 100 (1941) 16, 17, 18

United States v. Larkins, 852 F.2d 189 (6th Cir. 1988), *cert. denied*, 109 S.Ct. 1131 (1989) 6, 7

United States v. Ocie Mills, 817 F. Supp. 1546 (N.D. Fla. 1993) 5

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 7, 13, 15, 19

United States v. Women's Sportswear Assn., 336 U.S. 460 (1949) 15

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION

Article I, § 8, Cl. 3 13

STATUTES AND REGULATIONS

18 U.S.C. § 891 17

33 U.S.C. § 403 4

33 U.S.C. § 1251 *et seq* 3, 19

33 U.S.C. § 1251(a) 4

33 U.S.C. § 1311 4

33 U.S.C. § 1319 11

33 U.S.C. § 1344 4

33 U.S.C. § 1362(6) 11

42 U.S.C. § 2000a(b)(1) 14

42 U.S.C. § 2000a(b)(4) 14

42 U.S.C. § 2000(c) 14

33 C.F.R. § 328.3 8

33 C.F.R. § 328.3(b) 8

42 *Fed. Reg.* 37,129 (1977) 8

53 *Fed. Reg.* 8859 (1988) 7

LEGISLATION

Legislative History of the Clean Water Act of 1977, Vol. 3-4 (1978) 6

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Audubon Magazine, July (1990) 9

Farm Journal, June/July (1990) 10

EPA: "America's Wetlands: Our Vital Link Between Land and Water" (1988) 10

Thomas Jefferson, *Writings*, Vol. XIX 3

No. 93-733

In The

Supreme Court of the United States

October Term, 1993

JOHN POZSGAI and GIZELLA POZSGAI,

Petitioners,

v.

UNITED STATES OF AMERICA,
MERCER WRECKING & RECYCLING CORPORATION,
J. VINCH & SONS, INC.,

Respondents.

On Petition For *Writ* Of *Certiorari*
To The United States Court Of Appeals
For The Third Circuit

BRIEF *AMICI CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION, THE ALLIANCE FOR AMERICA, AND THE FAIRNESS TO LAND OWNERS COMMITTEE IN SUPPORT OF PETITIONERS

Mountain States Legal Foundation ("MSLF") respectfully submits this brief *amici curiae* in support of John Pozsgai and Gizella Pozsgai, the Petitioners for *writ* of *certiorari*.[1]

[1] *Amici* have obtained the written consents of the parties. The written consents have been provided to the Clerk of the Court.

IDENTITIES AND INTERESTS OF *AMICI CURIAE*

The Alliance for America ("Alliance") is a fifty state network of nearly five hundred independent grassroots organizations, whose collective membership numbers in the millions. These groups represent a variety of vocational, cultural, and political interests including farming, grazing, forestry, commercial fishing, mining, recreation, energy, animal welfare, private property protection, local government and various community and regional organizations. The Alliance was formed in 1991, and is intent on curbing excessive governmental regulation and the violation of constitutionally protected property rights resulting in family and community despair.

The Fairness to Land Owners Committee ("FLOC") is a Maryland-based, national organization with over 13,000 members who are property owners faced with confiscatory land-use regulations involving a number of federal and state statutes. FLOC is dedicated to protecting property rights, especially the right to the prudent use of one's own land, and is active in educating the public and lawmakers about the difference between conservation and confiscation.

MSLF is a non-profit, membership public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited government and the free enterprise system. MSLF's members include businesses and individuals who live and work in nearly every state of the country. A large number of MSLF's members work in businesses involved in the utilization and development of natural resources and, as a result, are actively involved in many environmental issues.

Many of *amici*'s members are engaged in farming and ranching activities across the country. Farming and ranching have long been recognized as the backbone of this nation:

> Whenever there are in any country uncultivated lands and unemployed poor it is clear that the laws of property have been so far extended as to violate natural right. The earth is given as a common stock for men to labor and live on. . . . The small landowners are the most precious part of the state.

Thomas Jefferson, *Writings*, Vol. XIX, p. 17.

As demonstrated herein, the implications of the Pozsgai case far transcend the Pozsgai's individual situation and are indicative of problems of nationwide magnitude. This case presents serious questions of how individual rights are to be protected from governmental excesses, both in the enforcement of laws, for the ostensible protection of the environment, and the administration of justice. *Amici* believe it is vitally important for this Court to protect these individual freedoms in the face of increasing civil and criminal enforcement under the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*

Amici's interests in the outcome of this lawsuit are directly tied to their members' private property rights. *Amici* have serious concerns that the ruling of the Third Circuit does violence to precedents written by this Court which recognize the constitutional limitations of our federal government.

OPINIONS BELOW, JURISDICTION, STATUTES INVOLVED AND STATEMENT OF THE CASE

Amici hereby adopt Petitioners' statement and description of the opinions below, jurisdiction, statutes involved, and statement of the case.

SUMMARY OF THE ARGUMENT

This case presents this Court with an extremely important constitutional issue on the reach of federal jurisdiction under the Commerce Clause, which has grave consequences for thousands of private property owners

whose farms, back yards, or one-quarter acre lots are subjected to strict and overly burdensome federal land-use control under the CWA. However, the CWA is not a federal land-use statute, its purpose is to protect water quality. The Army Corps of Engineers ("Corps") and the Environmental Protection Agency ("EPA") have assumed jurisdiction under the CWA which, given their penchant for overregulation, has caused them to regulate private property without any nexus to interstate commerce.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION: SECTION 404: THE GOVERNMENT'S PENCHANT FOR OVERREGULATION

The CWA, which was known as the Federal Water Pollution Control Act at the time of its enactment in 1972, is a comprehensive effort by Congress to restore and maintain the "chemical, physical, and biological integrity of the nation's waters." 33 U.S.C. § 1251(a). However, as laudatory as these goals may be, the actual legal requirements are found in other sections of the statute.

The cornerstone of the regulatory scheme established by the CWA is Section 301, 33 U.S.C. § 1311, which prohibits the discharge of "any pollutant" into "navigable waters," except when in compliance with various sections of the CWA, including Section 404, 33 U.S.C. § 1344. Section 404 establishes a program whereby the Corps issues permits for the "discharge of dredged and fill material." The Section 404 program is somewhat of an orphaned hybrid which arose out of the combination of the historic regulation by the Corps of obstructions to navigation under the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, and the environmental concerns of the CWA.

A troublesome shortcoming of the Section 404 program is that it bears, at best, a strained relationship to the purposes of the CWA, as evidenced by both the civil and criminal enforcement actions brought against Petitioners.

The purpose of the CWA is to protect water quality, not to regulate land-use. As stated recently by Judge Vinson in a similar CWA enforcement action:

> This case presents the disturbing implications of the expansive jurisdiction which has been assumed by the United States Army Corps of Engineers under the Clean Water Act. In a reversal of terms that is worthy of *Alice In Wonderland*, the regulatory hydra which emerged from the Clean Water Act mandates in this case that a landowner who places clean fill dirt on a plot of subdivided dry *land* may be imprisoned for the statutory felony offense of "discharging pollutants into the navigable *waters* of the U.S."

United States v. Ocie Mills, 817 F. Supp. 1546, 1548 (N.D. Fla. 1993) (emphasis in original).

The substance of the CWA's jurisdictional boundaries has not been altered by Congress since 1977. Even when Congress considered the 1977 amendments to Section 404, it attempted to curb what many members of Congress perceived as "the Corps' penchant for overregulation, particularly in cases of *de minimus* environmental concern." *1902 Atlantic, Ltd. v. Hudson*, 574 F. Supp. 1381, 1397-98 (E.D. Va. 1983). The *1902 Atlantic, Ltd.* Court's quotation from a colloquy during the floor debate on the Senate bill, (S. 1952) between Senator Muskie (the Senate manager of the 1977 amendments) and Senator Bentsen, is illustrative of Congress' concern for the Corps' penchant for overregulation:

> MR. BENTSEN: Mr. President . . . Section 404 has become a symbol to many Americans of how a well-intended legislative initiative can turn into a quagmire of disruption, frustration, and bureaucratic entanglement for the ranchers, farmers, foresters, and average citizens of this country.

* * *

> Section 404 has become synonymous with Federal overregulation, overcontrol, cumbersome bureaucratic procedures, and a general lack of realism. . . .
>
> * * *
>
> During Senate consideration on the conference report on the Clean Water Act of 1977, Senator Muskie, who also was one of the Senate conferees, stated that the statements made during Senate debate, such as the statements above, adequately reflect the legislative intent with respect to Section 404.

1902 Atlantic, Ltd., 574 F. Supp. at 1398, n.16 (quoting Legislative History of the Clean Water Act of 1977, Vol. 3-4, pp. 470, 901-902 (1978)) (emphasis added).

Unfortunately, despite the concerns expressed in 1977, by Senators Bentsen and Muskie, things have become worse – not better. The "penchant for overregulation" (by both the Corps and EPA) now victimizes farmers and landowners nationwide, including *amici*'s membership, as the Corps and EPA attempt to use the CWA to expand their "regulatory turf" out of the water, out of the swamps and marshes, straight onto dry land.

Much like Judge Vinson's discomfort with the Corps' regulatory framework, in *United States v. Larkins*, 852 F.2d 189 (6th Cir. 1988), *cert. denied*, 109 S.Ct. 1131 (1989), Circuit Judge Merritt went out of his way, *sua sponte*, to criticize the Corps' overexpansive jurisdictional approach:

> [T]he Corps has not expanded the definition of "navigable waters" to include any creek or stream or moist area. . . . "Under such a construction [as proposed by the Corps of Engineers] low lying backyards miles away from a navigable waterway would become wetlands." [citation omitted] The Corps' definition has

> apparently detached and untied the "wetlands" jurisdiction of the Corps from any concept of "open waters" or navigable waters. A farmer's low lying farmland or a homeowner's low lying backyard – adjacent to a small stream or creek many miles from any navigable waterway – has apparently been converted into government property no longer subject to control or improvement by the owner without government permission. A "wetlands" has apparently been read to include simply "moist land adjacent to a creek." The framers of the Constitution were solicitous of the rights of landowners – especially small farmers struggling for survival – not to have land appropriated by the government. They therefore adopted the provision of the Fifth Amendment of the Constitution prohibiting the taking of private property for public use without just compensation.

United States v. Larkins, 852 F.2d at 193 (Merritt, J., concurring).

Unlike the present case, *Larkins* involved land covered in part with "knee deep waters" and cypress trees, 659 F. Supp. 76, 79, containing numerous sloughs and depressions which defendants filled, 852 F.2d at 190, and which previously "tended to be covered by standing water." *Id.* at 191. Although this Court has held that a "taking" claim is no defense to a § 404 enforcement action, *see United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127-28 (1985), as indicated by Judge Merritt in *Larkins*, it is fundamentally wrong for the government to try and seize control of its citizens' property under the pretext of enforcing an "anti-water pollution" statute. *See* Exec. Order 12630, March 15, 1988, 53 *Fed. Reg.* 8859, "Governmental Actions and Interference With Constitutionally Protected Property Rights" (directing each

agency to account for Fifth Amendment "taking" concerns in carrying out actions, *including* regulatory and permitting functions).

A. THE REGULATORY HYDRA: REGULATING DRY LAND.

1. THE CORPS' REGULATIONS PURPORT TO REGULATE ONLY TRULY AQUATIC AREAS.

The new trend (*i.e.*, regulating under § 404 as if it were a "land preservation statute," instead of an "anti-water pollution" statute), even stands in direct contradiction to the Corps and EPA's own regulations. The regulations defining "wetlands" have remained unchanged since 1977. After defining "wetlands," the regulations further clarify the definition by stating that "[w]etlands generally include swamps, bogs, marshes, and similar areas." 33 C.F.R. § 328.3(b). As stated in the preamble to the 1977 regulations, this language was included to demonstrate the intent of the Corps to include "only truly aquatic areas." 42 *Fed. Reg.* 37,129 (1977).

Notably, the Corps' clarifying sentence of its "wetlands definition" does *not* state that wetlands generally include *corn fields, soybean fields,* and *vacant lots.* Thus, unless corn fields, soybean fields, and vacant lots are "similar areas" to "swamps, marshes, and bogs," 33 C.F.R § 328.3(b), regulatory jurisdiction cannot attach.

The rule of *ejusdem generis* demands that "where general words follow an enumeration of specific things, the general words are read as applying only to other items akin to those specifically enumerated." *Harrison v. P.P.G.*, 446 U.S. 578, 588 (1980).

The general words "similar areas" follow the more specific words "swamps, marshes, bogs" in the definition of wetlands contained in 33 C.F.R. § 328.3. Consequently, for land to be considered a "wetland," it must be the same type of area as a swamp, marsh, or bog. The Corps

and EPA, however, have recently attempted to discard this plain reading, and now interpret the phrase "similar areas" to mean "other areas" – including cultivated farm fields, dry lots, and other typically non-aquatic areas.

Why the new quest to regulate dry land? An environmental group's recent publication sheds light on the Corps' motive – bureaucratic self-preservation:

> For civil engineers in general, environmental projects offer a boundless future. For the Corps in particular they mean job security. The day of huge river basin projects has passed; with growing public resistance to such projects, and tightening budget constraints, the Corps could be relegated to custodian status. Environmental engineering offers the Corps steady work, an image pure and true – and an almost bottomless pork barrel.

Audubon Magazine, July, 1990, at 111. Thus, from the Corps own self-interest arose a new Manual for making jurisdictional determinations over supposed "wetlands."

2. NATIONWIDE REACTION TO THE CORPS/EPA'S DRY "LAND GRAB."

Concern over the Corps and EPA's wetlands regulatory expansion (and abuse) is growing nationwide, with good reason. The "Federal Manual for Identifying, and Delineating Jurisdictional Wetlands," which was published as a joint effort between the Corps, EPA, and two other agencies on January 10, 1989, sets forth "*mandatory*" technical criteria and methods for identifying and delineating jurisdictional wetlands. The new Manual and the expanding regulatory policies of the agencies have recently met with sharp criticism by Congress. For example:

> Unfortunately, the current direction of our wetlands policy is progressing in ways that were never envisioned by Congress. The changes that

> are being attempted do not follow congressional intent. Rules and regulations are being written by bureaucrats who believe they have long been stifled over at EPA during the past eight years, and now, giving them an inch, they are taking a mile.
>
> The Federal Manual for Identifying and Delineating Jurisdictional Wetlands, written from within the bowels of the Interior Department makes serious changes in our definition of wetlands. These changes were never proposed or discussed before a Committee of this Congress, nor were the changes proposed in the Federal Register. This new definition substantially impacts our nation, particularly rural areas, and enhances our government's "land grab" abilities.

Testimony of Congressman Emerson before the Subcommittee on Water Resources, Committee on Public Works and Transportation: "Wetlands Hearing," February 28, 1990.

Similarly, former President Bush, who announced the "no net loss of wetlands" policy which energized the Corps and EPA to draft the Manual in question, has stated the Executive Branch's concerns with the agencies' overregulation:

> We are trying to do a better job of getting these agencies to work together, but you have zealots in various levels of the bureaucracy. We will try very hard from the top on down to get the clarification that is needed to avoid this frustration among farmers. I am not happy with this. . . .

June/July, 1990, *Farm Journal*, p. 17.

B. THE PENCHANT FOR OVERREGULATION SIGNIFICANTLY IMPACTS THE REGULATED COMMUNITY.

The national significance of this case, and the nationwide magnitude of the problem faced by landowners, is heightened by the Corps/EPA attempt to leave behind their aquatic jurisdictional boundaries and come onto dry land. A revealing and alarming portrait of these agencies' view of their expanding jurisdiction is found in a fairly recent EPA publication which states: "If there's not a wetland in your neighborhood, there's probably one nearby." EPA: "America's Wetlands: Our Vital Link Between Land and Water," p. 1 (1988). Landowners across the nation have become outraged and adamantly disagree with the agencies' claims that their dry, solid-ground constitutes "navigable water" under the CWA, and that merely moving dirt (not "cellar dirt," 33 U.S.C. § 1362(6)) in a field, or on a dry lot, is considered a "discharge of a pollutant into water." Thus, Petitioners' statutory question presented, whether, as a matter of statutory interpretation, § 1362(6) of the CWA, which defines "pollutants" as certain materials "discharged into water," can be construed to mean the discharge of clean fill "near water" or "onto wetlands," is an important question for this Court to decide.

Significantly, many, if not most landowners (such as Petitioners) find themselves confronted with the agencies' jurisdictional claim only *after* they have already commenced work on what any reasonable person would view as a non-aquatic area. When the agencies assert jurisdiction and inform the landowner that he or she is a "violator" and a "water polluter" subject to the wide gambit of potential penalties and injunctive relief set forth in the CWA, *see* 33 U.S.C. § 1319, the landowner is placed in a precarious position indeed. He can capitulate, face an "enforcement action," or attempt to obtain judicial declaratory relief for an action which no reasonable man would have considered to be illegal. The agencies then typically

capitalize on their superior bargaining position and the extreme imbalance of economic and other resources to extort "mitigation" by offering the "carrot" of a § 404 permit, all the while "wielding the club" of enforcement, which includes the threat of imprisonment, fines, costly litigation and/or "restoration" – alternatives and risks the agencies know the unfortunate landowner can ill afford.

II. IN ENACTING THE CLEAN WATER ACT, CONGRESS DID NOT INTEND TO INCLUDE ALL AREAS THAT MEET THE REGULATORY WETLANDS DEFINITION WITHOUT REGARD TO THE EFFECT OF THEIR USE ON INTERSTATE COMMERCE.

Amici submit that the Third Circuit has oversimplified Commerce Clause principles and largely ignored the "effect on commerce" test to be used in determining whether a Commerce Clause nexus exists. *Amici* certainly do not deny that Congress has broad power under the Commerce Clause to affirmatively regulate activities which cumulatively have a significant effect on interstate or foreign commerce, even if a particular individual activity alone does not have a major effect. However, Congress, in enacting the CWA, never expressed an intent to dispense with the test that there is discretion to determine, on particular facts, whether the minimal Commerce Clause nexus has been met. Thus, Congress never explicitly exercised its Commerce Clause powers to regulate, as a class, all wetlands, however defined, as it has for other regulatory programs designed to control activities such as strip mining and loan sharking.

Given this lack of express legislative intent, the Third Circuit seriously departed from the teachings of this Court and the practice of its sister circuits by failing to analyze what effect, if any, on interstate commerce is caused by Petitioners' placement and maintenance of clean fill material on their private property. The Third

Circuit's alleged nexus to interstate commerce is not predicated upon any allegation by the government that the placement of clean fill on Petitioners' property hundreds of yards from a drainage stream *does* exert, or can reasonably be expected *to exert*, an effect on interstate commerce; rather, the nexus arises *solely* from the geographical and historical fact that Petitioners' property is adjacent to a drainage ditch or stream that is a *tributary* of a waterway that *was* used in interstate commerce in the 1800's.

It has generally been held that to fall within Article I, § 8, Cl. 3 (the "Commerce Clause" of the Constitution) an activity must satisfy either (1) the "in commerce" test or (2) the "effect on commerce" test. The "in commerce" test requires that the subject activity be part of one or more interstate transactions, or that the activity be "an integral part of the transaction, inseparable from the interstate aspects." *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (title examination held an integral part of the interstate residential real estate financing market); *Construction Aggregate Transport, Inc. v. Fla. Rock Industries, Inc.*, 710 F.2d 752, 766-67 (11th Cir. 1983) (when antitrust plaintiff and defendant engaged in purely intrastate business, "it [was] clear that 'in commerce' or 'flow of commerce' theory of jurisdiction [was] not available . . . ").

A. THE CLEAN WATER ACT DOES NOT REACH TO THE CONSTITUTIONAL LIMIT OF THE CONGRESSIONAL POWER TO REGULATE INTERSTATE COMMERCE.

Loose language in several lower court decisions assert that the CWA reaches as far as the Commerce Clause permits. Significantly, however, this Court in *Riverside Bayview* expressly declined the invitation to endorse these dicta. *Id.* at 135, 137, 138. After all, so long as a substantial effect on interstate commerce is shown, Congress may regulate the use of entirely dry land. *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S.

264, 275-277, 281-283 (1981). Yet no one suggests that the CWA permits the Corps or EPA regulate any *land* that is used in interstate commerce without regard to the presence of water. Nor is it arguable that the CWA embraces all *aquatic* sites with respect to which the Commerce Clause might authorize federal legislation. Thus, although the Civil Rights Act of 1964 reaches hotel swimming pools (*see* 42 U.S.C. § 2000a(b)(1), (b)(4), (c)), presumably no one claims that they are within the jurisdiction of the Corps or EPA under the CWA.

The upshot is that § 404 of the CWA, at most, reaches the non-navigable portions and significant non-navigable tributaries of waters actually or potentially navigable, together with their immediately adjacent wetlands. Accordingly, the Corps and EPA regulations at issue must be condemned as unauthorized insofar as they purport to regulate waters or wetlands which are not adjacent to a navigable water system on non-wetland areas above the line of mean high tides.

B. THE "EFFECT ON COMMERCE TEST" IS AN ESSENTIAL ELEMENT IN DETERMINING WHETHER AN ACTIVITY COMES WITHIN THE COMMERCE CLAUSE.

The "effect" test has been variously interpreted to require either (1) a "substantial effect" or (2) "not insubstantial" effect on interstate commerce. The leading Supreme Court case on this test, *McClain v. Real Estate Board of New Orleans, Ins.*, 444 U.S. 232, 241-245 (1980), seems to use the terms interchangeably, finding that an antitrust plaintiff had demonstrated that a certain real estate brokerage activity had a "substantial effect" on interstate commerce so as to fall within the reach of the Sherman Anti-Trust Act. *See also Del Rio Distributing Co., Inc. v. Adolph Coors Co.*, 589 F.2d 176 (5th Cir. 1979).

The "effects" test does not universally require that a particular defendant's unlawful activity "directly" affect commerce. Under proper circumstances, indirect effects

of the activity can be sufficient. Moreover, the effect of the alleged injury may be examined in the context of "cumulative" damage from the universe of similar activities. *United States v. Women's Sportswear Assn.*, 336 U.S. 460, 464 (1949).

The "effects" test was articulated by this Court in *Hodel v. Virginia Surface Mining and Reclamation Assn.*, 452 U.S. 264, 282 (1981). In *Hodel*, this Court upheld the constitutionality of the Surface Mining Control and Reclamation Act of 1977, holding that the Commerce Clause allows congressional regulation of "activities causing air and water pollution, or other environmental hazards that may have effects in more than one state." The *Hodel* Court also rejected petitioners' argument that the subject of the Act was "land use," which was primarily a local activity. To this Court, the commodity at issue – coal – moves in interstate commerce. Therefore, this Court relied on the long-standing rule that "Congress may regulate the conditions under which goods shipped in interstate commerce are produced where the local activity of producing these goods itself affects interstate commerce." *Id.* (citations omitted.) However, this Court still emphasized:

> [s]ome activities may be so private or local in nature that they simply may not be *in* commerce. Nor is it sufficient that the person or activity reached have some nexus with interstate commerce. Our cases have consistently held that the regulated activity must have a *substantial* effect on interstate commerce.

452 U.S. at 311 (emphasis added.)

These principles have been especially applied in construing the constitutional reach of the CWA. *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985). In enacting the CWA, Congress still required the executive branch to determine if the requisite maximum nexus to interstate commerce exists in specific cases.

C. CONGRESS NEVER EXPLICITLY REQUIRED THE REGULATION OF ALL ACTIVITIES THAT IN ANY WAY AFFECT *ANY* AREAS CONTAINING WETLANDS MEETING THE CORPS' AND EPA'S REGULATORY DEFINITION.

The Third Circuit erred in rejecting Petitioners' claim that the government failed to show how Petitioners' property affects any interstate commerce, stating that such jurisdiction was "irrebuttally presumed" by the Corps' regulations. Petitioners' App. at 21a. The court also erroneously relied upon a line of cases which suggest that Congress' Commerce Clause power is so broad in scope that no activity can have too small an impact to escape its reach. However, there is a key distinguishing feature to this line of Commerce Clause cases – they address situations where Congress had explicitly found that a particular activity or activities, as a class, affect interstate commerce and must be regulated as a class in order to achieve specific legislative goals. In contrast, Congress has never made such an explicit finding with respect to all areas which contain wetlands meeting the Corps' and EPA's regulatory definition.

For example, in *United States v. Darby*, 312 U.S. 100 (1941), this Court upheld an Act of Congress which prohibited the employment of workers in the production of goods for interstate commerce at other than prescribed wages and hours. This Court found that Congress had prescribed a "class of activities" to be regulated which was properly within Congress' Commerce Clause power without proof that the particular intrastate activity had an effect on commerce. A unanimous Court stated:

> Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on commerce, as in the Sherman Act. *It has sometimes left it to an administrative board or agency to determine whether the activities sought to be regulated or prohibited*

> *have such effect, as in the case of the Interstate Commerce Act, and the National Labor Relations Act, or whether they come within the statutory definition of the prohibited Act, as in the Federal Trade Commission Act.* And sometimes Congress itself had said that a particular activity affects the commerce, as it did in the present Act, the Safety Appliance Act and the Railway Labor Act. In passing on the validity of legislation of the class last mentioned the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power.

312 U.S. at 120-121 (emphasis added).

Similarly, in *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 247 (1964), this Court upheld the constitutionality of the 1964 Civil Rights Act which declared that "any inn, hotel, motel, or other establishment which provides lodging to transient guest affects commerce *per se*" as affirmatively regulating a class of activities in order to protect individual civil rights. In a companion case, *Katzenbach v. McClung*, 379 U.S. 294, 298 (1964), this Court upheld the constitutionality of the restaurant provision of the same Civil Rights Act which regulated the restaurant "if . . . it serves or offers to serve interstate travelers or a substantial portion of the food which it serves . . . has moved in commerce." In *Perez v. United States*, 402 U.S. 146 (1971), this Court held that Congress in enacting the Consumer Credit Protection Act of 1964, 82 Stat. 159, 18 U.S.C. § 891, especially determined that "extortionate credit activities" as defined by Congress, affect interstate commerce. Therefore,

> Congress appropriately considered the 'total incidence' of the practice on commerce [and]
>
> Where the class of activities is regulated and that class is within the reach of federal

> power, the courts have no power to 'excise as trivial individual instances' of the class.

402 U.S. at 151 (citation omitted).

Further, even where the object of federal regulations is environmental protection, the courts have looked for congressional intent to exercise its plenary Commerce Clause power to regulate all incidents of a class of activities. In *Hodel v. Virginia Surface Mining & Reclamation Association*, the Court held that Congress had determined that surface mining activities as a class, create adverse environmental effects on interstate commerce and therefore are a proper subject for congressional regulation. In so doing, this Court cited the

> [C]ongressional finding that nationwide "surface mining and reclamation standards are essential in order to insure that competition in interstate commerce among sellers of coal produced in different States will not be used to undermine the ability of the several States to improve and maintain adequate standards on coal mining operations within their borders." 30 U.S.C. § 1201(g).

452 U.S. at 281-282.

In contrast, the CWA is an example of where, in the words of *Darby, supra*, Congress "left it to the administrative board or agency to determine whether the activities sought to be regulated or prohibited have the [required] effect" on interstate commerce. *Darby*, 312 U.S. at 120. In particular, Congress has never identified wetlands as a class that automatically requires protection in all cases, even in the admittedly rare instance of a purely isolated waterbody which may have some incidental wetlands vegetation but has no identifiable use with an effect on commerce. Rather, Congress nowhere defined the term "wetlands" or its exact relationship to "waters of the United States." Instead, it left that definition and its application to the judgment of the executive branch. In fact, while the legislative scheme set up in the CWA "to

restore and maintain the chemical, physical and biological integrity of the Nation's waters," CWA § 101, 33 U.S.C. § 1251, was intended to expand federal regulation beyond the reach of traditionally navigable waters, Congress did not automatically include every waterbody, however isolated, within the coverage of the Act. As this Court noted in *United States v. Riverside Bayview Homes*:

> In keeping with these views, Congress chose to define the waters covered by the Act broadly. Although the Act prohibits discharges into "navigable waters," [citations omitted], the Act's definition of "navigable waters" as "the waters of the United States" makes it clear that the term "navigable" as used in the Act is of limited import. In adopting this definition of "navigable waters," Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate *at least some waters that would not be deemed "navigable" under the classical understanding of that term*. See S. Conf. Rep. No. 92-1236, p. 144 (1972); 118 Cong. Rec. 33756-33757 (1972) (statement of Rep. Dingell).

474 U.S. at 133 (emphasis added).

Thus, this Court's *Riverside Bayview* decision does not remotely suggest that the CWA embraces non-navigable waterbodies that are not connected to any navigable water system, much less isolated wetlands, wetlands above the headwaters, or temporarily ponded rainwater. This Court pointedly did not endorse the Government's suggestion that the 1977 reconsideration of the statute should be taken as proof that § 404, as enacted in 1972, was intended to authorize the full sweep of the Corps' regulations, including the provision that reaches "isolated" waters and wetlands.

CONCLUSION

For the foregoing reasons, a *writ* of *certiorari* should be issued to review the decision of the Third Circuit Court of Appeals. The insidious assault which that decision permits against our constitutionally protected federal form of government must be turned back.

Respectfully submitted,

PAUL M. SEBY
WILLIAM PERRY PENDLEY*
(*Counsel of Record)
MOUNTAIN STATES LEGAL FOUNDATION
1660 Lincoln Street, Suite 2300
Denver, Colorado 80264
(303) 861-0244

Attorneys for Amici Curiae

January 10, 1994

No. 93-733

JAN 10 1994
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOHN POZSGAI AND GIZELLA POZSGAI, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Acting Assistant Attorney General

ROBERT L. KLARQUIST
VICKI L. PLAUT
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the Commerce Clause of the Constitution, Article I, Section 8, Clause 3, authorizes congressional regulation of wetlands that are adjacent to, but above the headwaters of, tributaries of navigable waters, as provided for by Section 404 of the Clean Water Act, 33 U.S.C. 1344, and applicable regulations.

2. Whether the definition of "pollutant" in Section 502(6) of the Clean Water Act, 33 U.S.C. 1362(6), to include certain materials "discharged into water" includes the discharge of materials onto wetlands.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Heart of Atlanta Motel, Inc. v. *United States*, 379 U.S. 241 (1964)	8
Hodel v. *Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264 (1981)	8, 9
Perez v. *United States*, 402 U.S. 146 (1971)	10
Pozsgai v. *United States*, No. 89-1735 (O.T. 1990)	11
Quivira Mining Company v. *EPA*, 765 F.2d 126 (10th Cir. 1985), cert. denied, 474 U.S. 1055 (1986)	10
United States v. *Ashland Oil and Transportation Co.*, 504 F.2d 1317 (6th Cir. 1974)	10
United States v. *Byrd*, 609 F.2d 1204 (7th Cir. 1979)	10
United States v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985)	2, 4, 9, 11
United States v. *Tull*, 769 F.2d 182 (4th Cir. 1985), rev'd, 481 U.S. 412 (1987)	10

Constitution, statutes and regulations:

U.S. Const.:	
Art. I, § 8, Cl. 3 (Commerce Clause)	6, 7, 8, 9, 10
Amend. VII	10
Clean Water Act, 33 U.S.C. 1251 *et seq.*	2
§ 101(a), 33 U.S.C. 1251(a)	2
§ 101(d), 33 U.S.C. 1251(d)	3
§ 301(a), 33 U.S.C. 1311(a)	2, 6
§ 309(b), 33 U.S.C. 1319(b)	2, 5
§ 309(c), 33 U.S.C. 1319(c)	2

Statutes and regulations—Continued: Page

§ 404, 33 U.S.C. 1344 2
§ 404(a), 33 U.S.C. 1344(a) 3
§ 404(a)(1), 33 U.S.C. 1344(a)(1) 3
§ 404(a)(5), 33 U.S.C. 1344(a)(5) 3
§ 404(a)(7), 33 U.S.C. 1344(a)(7) 3
§ 404(d), 33 U.S.C. 1344(d) 3
§ 502(6), 33 U.S.C. 1362(6) 2, 6, 10, 11
§ 502(7), 33 U.S.C. 1362(7) 2
§ 502(12), 33 U.S.C. 1362(12) 2, 6, 11
33 C.F.R.:
Section 328.3(a) (1987) 3
Section 328.3(b) (1987) 4
Section 330.2(b) (1987) 7
Section 330.5(a)(26) (1987) 7
40 C.F.R. 230.3(s) (1981) 3

Miscellaneous:

42 Fed. Reg. 37,128 (1977) 9
51 Fed. Reg. 41,239 (1986) 3

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-733

JOHN POZSGAI AND GIZELLA POZSGAI, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 999 F.2d 719. The orders of the district court (Pet. App. 28a-32a, 34a-37a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1993. A petition for rehearing was denied on August 10, 1993. Pet. App. 39a. The petition for a writ of certiorari was filed on November 8, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a civil enforcement action instituted by the United States in the United States District Court for the Eastern District of Pennsylvania under Section 309(b) of the Clean Water Act, 33 U.S.C. 1319(b). The district court found petitioners liable. The court of appeals affirmed. Pet. App. 1a-27a.[1]

1. The Clean Water Act, 33 U.S.C. 1251 *et seq.*, is a comprehensive statute designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." § 101(a), 33 U.S.C. 1251(a). Section 301(a) of the Act, 33 U.S.C. 1311(a), provides that "the discharge of any pollutant by any person shall be unlawful" unless it is authorized by a permit issued by the Army Corps of Engineers pursuant to Section 404, 33 U.S.C. 1344. See *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985). The definitional Section of the Act, in turn, defines "pollutant" to include any dredged or fill material, Section 502(6), 33 U.S.C. 1362(6); it defines "discharge of a pollutant" to include "any addition of any pollutant to navigable waters," Section 502(12), 33 U.S.C. 1362(12); and it defines "navigable waters" to mean "the waters of the United States," Section 502(7), 33 U.S.C. 1362(7).

---

[1] In related criminal proceedings, petitioner John Pozsgai was convicted of criminal violations of Section 309(c) of the Clean Water Act, 33 U.S.C. 1319(c). The district court sentenced him to three years of imprisonment, to be followed by five years of probation, and a $200,000 fine (which subsequently was reduced to $5,000). The court of appeals affirmed, 897 F.2d 524, and this Court denied a petition for a writ of certiorari, 498 U.S. 812 (1990).

The Act divides responsibility for administration between the Environmental Protection Agency (EPA)—which has general responsibility for administering the Act, "[e]xcept as otherwise expressly provided," Section 101(d), 33 U.S.C. 1251(d)—and the Army Corps of Engineers—which has the authority to issue permits allowing discharges into navigable waters, Section 404(a), 33 U.S.C. 1344(a).[2] The Corps has promulgated regulations that define "waters of the United States" to include:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce * * * ;
>
> * * * * *
>
> (5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;
>
> * * * * *
>
> (7) Wetlands adjacent to waters * * * identified in paragraphs (a)(1) through (6) of this section.

33 C.F.R. 328.3(a) (1987).[3]

Those regulations also define the term "wetlands" to mean:

---

[2] Section 404(a) refers to the "Secretary," but Section 404(d) defines the term "Secretary" to mean "the Secretary of the Army, acting through the Chief of Engineers." 33 U.S.C. 1344(d).

[3] The 1987 regulations, originally promulgated at 51 Fed. Reg. 41,239 (1986), were in effect at the time of the conduct at issue in this case. The EPA also promulgated substantially identical regulations. 40 C.F.R. 230.3(s) (1981). For the sake of clarity, this brief refers only to the Corps regulations.

> those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

33 C.F.R. 328.3(b) (1987). In *Riverside Bayview Homes*, this Court sustained that regulatory framework, explaining that it was "reasonable for the Corps to interpret the term 'waters' to encompass wetlands adjacent to waters as more conventionally defined." 474 U.S. at 133.

2. This case involves a 14-acre site in Morrisville, Pennsylvania. As the court of appeals explained, that site is "a forested wetland dominated by arrowwood," with "areas of standing water * * * scattered throughout the site." Also, "[a] stream flows along the east border of the property * * * [that] is a tributary to the Pennsylvania Canal," which flows into the Delaware River. When the Corps learned in April 1987 that fill material was being dumped onto the property, Martin Miller (a Corps field investigator) examined the property. He determined that the great majority of the property was wetland and that petitioner John Pozsgai[4] had deposited "fill (concrete rubble, earth, and building scraps) in three portions of the wetland for the purpose of raising the elevation." After his examination, Miller advised petitioner that he should not place any more fill in the wetland por-

---

[4] For convenience, references in this brief to "petitioner" in the singular refer to petitioner John Pozsgai.

tions of the property until petitioner obtained a permit from the Corps. Pet. App. 2a-3a; see *id.* at 34a.

In June 1987, petitioners purchased the property. After Miller observed in August 1987 that additional fill had been placed on the property, the Corps issued a September 3, 1987, cease and desist letter, ordering petitioners to cease "conducting, contracting, or permitting" further filling of the property. Miller observed additional filling on each of two subsequent visits to the property in October and November 1987, as a result of which the Corps issued a second cease and desist letter, on December 17, 1987. In May 1988, the Corps discovered that petitioner had discharged several hundred truckloads of fill onto the property. See Pet. App. 3a-4a.

3. On August 24, 1988, the United States instituted this action under 33 U.S.C. 1319(b), seeking civil penalties and an order that petitioners and the companies that had discharged the fill restore the property to its original condition. The government simultaneously moved for a temporary restraining order and a preliminary injunction; the court granted the temporary restraining order. After petitioner continued dumping, the court held him in contempt and granted a preliminary injunction against further dumping. See Pet. App. 4a-5a.

On January 8, 1990, the district court issued an order concluding that the property was protected wetland because of its physical characteristics and because it is adjacent to an unnamed tributary of the Pennsylvania Canal, which flows into the Delaware River. The court accordingly entered a permanent injunction against any further filling and ordered the land to be restored. Pet. App. 34a-37a.

4. Petitioners filed a motion to reconsider, contending (among other things) that their activities did not violate the Clean Water Act because the discharge of fill onto wetlands is not a discharge of a pollutant "into water" within the meaning of Section 502(6) of the Clean Water Act, 33 U.S.C. 1362(6). The district court denied the motion. Pet. App. 28a-32a. The court reasoned that the term "water" in the Clean Water Act includes "wetlands." *Id.* at 31a.

5. The court of appeals affirmed. Pet. App. 1a-27a.

a. The court first considered petitioners' statutory argument, that the filling of wetlands does not constitute a discharge "into water" within the meaning of the Clean Water Act. Pet. App. 8a-16a. The court noted that the Act applies only to a "discharge of any pollutant," 33 U.S.C. 1311(a), and that the definition of "pollutant" is limited to materials that are "discharged into water," 33 U.S.C. 1362(6). The court relied heavily, however, on the definition of "discharge of a pollutant" in 33 U.S.C. 1362(12), which refers to the addition of materials "to navigable waters." The court rejected petitioners' contention that the reference to "water" in Section 1362(6) cannot include wetlands, even though this Court had already concluded (in *Riverside Bayview Homes*) that the term "navigable waters" does include wetlands. Accordingly, in the court's view, the breadth of the reference to "navigable waters" applies throughout the Act, which thus applies to any discharge of covered materials into navigable waters. Pet. App. 9a-10a.

b. The court also rejected petitioners' claim that application of the Act in this case extended beyond the powers bestowed on Congress by the Commerce Clause of the Constitution. Pet. App. 21a-24a. The

court explained that application of the statute is constitutional "if there is a rational basis for the congressional determination that the regulated activity affects interstate commerce, and if the means chosen to regulate the activity are reasonable." *Id.* at 21a (internal quotation marks omitted). The court rejected petitioners' argument that the government must establish an individualized impact on commerce in each case, explaining that the cases on which petitioner relied interpreted statutes in which "Congress chose to satisfy the Commerce Clause by requiring an individualized interstate commerce effect in each application of the law." *Id.* at 22a.

The court of appeals also rejected petitioners' argument that any effect on commerce was insufficiently substantial to satisfy the Constitution because the discharge in question was made into wetlands above the headwaters.[5] Pet. App. 22a-24a. The court explained that the government has made an "expert determination that, in the aggregate, discharge into wetlands above the headwaters which are adjacent to tributaries of waters used or usable in interstate commerce, increases water pollution," *id.* at 23a, and accordingly upheld application of the statute in this case.

---

[5] Applicable regulations define "headwaters" as "the point on a non-tidal stream above which the average annual flow is less than five cubic feet per second." 33 C.F.R. 330.2(b) (1987). The regulations grant a blanket, nationwide permit for certain discharges into wetlands above headwaters, but that permit did not apply to petitioners' discharges. 33 C.F.R. 330.5(a)(26) (1987); see Pet. App. 19a-20a.

ARGUMENT

1. Petitioners' primary argument (Pet. 8-19) is that Congress's power under the Commerce Clause of the Constitution, Article I, Section 8, Clause 3, is not sufficient to support application of the Clean Water Act to restrict filling of wetlands that are adjacent to tributaries of navigable waters at a location above the headwaters of those tributaries, except in cases where the government can make a specific showing that the filling has a substantial effect on interstate commerce. That claim is meritless.

Petitioners' argument hinges on their view that the government must establish that "in a majority of [cases, a discharge] would have significant effects on water quality or interstate commerce." Pet. 11. That view misapprehends this Court's modern decisions regarding the Commerce Clause, under which an exercise of the Commerce Clause power is valid if there is "a rational basis for finding that [the regulated activity] affected [interstate] commerce." *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 258 (1964). Furthermore,

> [j]udicial review in this area is influenced above all by the fact that the Commerce Clause is a grant of plenary authority to Congress [that] * * * extends not only to the use of channels of interstate or foreign commerce and to protection of the instrumentalities of interstate commerce * * * but also to activities affecting commerce.

Hodel v. *Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264, 276-277 (1981) (internal quotation marks omitted).

Application of that standard to the activity in question here demonstrates that the Commerce Clause

clearly authorizes the regulations at issue. As the Court recognized in *Riverside Bayview Homes*, the government reasonably has concluded that the goal of the Clean Water Act—"protection of water quality and aquatic ecosystems"—can effectively be pursued only if the protection extends beyond the open waters themselves to wetlands adjacent to those waters. 474 U.S. at 133. The reason for that conclusion is obvious: "Water moves in hydrologic cycles, and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark * * * will affect the water quality of the other waters within that aquatic system." *Id.* at 134 (quoting 42 Fed. Reg. 37,128 (1977)). To put it more simply, it is unquestionably rational to conclude that a discharge of materials into wetlands adjacent to a body of water that flows into a navigable stream will affect the quality of the adjacent water, and thus eventually the navigable stream itself.

It is clear (as petitioner implicitly concedes) that the Commerce Clause authorizes regulation of the pollution of navigable streams. See *Hodel*, 452 U.S. at 282 ("[W]e agree with the lower federal courts that have uniformly found the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water pollution."). Because it is rational to conclude that the discharge of materials into the category of wetlands such as the wetlands at issue here has an effect on commerce subject to congressional regulation, petitioners' Commerce Clause argument fails.[6]

---

[6] Petitioners' argument (Pet. 17-19) that "the agency has the burden of proving" in each case that there is an effect on interstate commerce is similarly inconsistent with this Court's

We are unaware of any decision of any court upholding a Commerce Clause attack on application of the Clean Water Act. Indeed, when the courts of appeals have addressed the question, they uniformly have upheld the constitutionality of the Act as interpreted by the Executive Branch, albeit in factual settings differing from those at issue here. See *United States* v. *Tull*, 769 F.2d 182, 185 (4th Cir. 1985) (wetlands adjacent to navigable waterway), rev'd on Seventh Amendment grounds, 481 U.S. 412 (1987); *Quivira Mining Company* v. *EPA*, 765 F.2d 126, 129-130 (10th Cir. 1985) (creeks that flowed into navigable stream), cert. denied, 474 U.S. 1055 (1986); *United States* v. *Byrd*, 609 F.2d 1204, 1209-1211 (7th Cir. 1979) (wetlands adjacent to an inland lake); *United States* v. *Ashland Oil and Transportation Co.*, 504 F.2d 1317, 1325-1329 (6th Cir. 1974) (wetlands adjacent to nonnavigable tributaries of navigable waterways).

2. Petitioners also repeat their argument that the Clean Water Act does not apply to the discharge of materials onto wetlands because that is not a discharge "into water" for purposes of Section 502(6) of the Act, 33 U.S.C. 1362(6). The court of appeals

---

explication of congressional power in the area. As the Court explained in *Perez* v. *United States*, 402 U.S. 146, 156-157 (1971), the Commerce Clause does not require "particularized findings"; it is enough for Congress to determine rationally that an activity in its "national setting" is one that has a substantial effect on interstate commerce. Petitioner offers no sound reason for rejecting the legislative conclusion that the cumulative nationwide effect of discharges into wetlands adjacent to bodies of water that flow into navigable streams has a sufficiently substantial effect on interstate water quality to justify congressional action, even if the inquiry is limited to discharges that occur above the headwaters.

addressed that contention at length (Pet. App. 8a-16a), and we previously have responded to that claim in our brief in opposition to petitioner's challenge to his criminal conviction, Br. in Opp. at 12-13, *Pozsgai* v. *United States*, No. 89-1735 (O.T. 1990). The fundamental flaw in that contention is that it rests on the premise that the reference to "water" in Section 502(6) should be construed to exclude "wetlands" even though this Court already has held that the (arguably narrower) term "navigable waters" in Section 502(12) includes "wetlands," *Riverside Bayview Homes*, 474 U.S. at 133. The Court denied petitioner's earlier petition raising that question, 498 U.S. 812 (1990), and there is no reason for a different disposition in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Acting Assistant Attorney General

ROBERT L. KLARQUIST
VICKI L. PLAUT
Attorneys

JANUARY 1994